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No. 02-

IN THE

Supreme Court of the United States

PATRICIA C. ANDERSON, MICHAEL A. HOSEIN, AND STEPHEN E. PARKER,

Petitioners,

v.

ALEXANDER F. TREADWELL, AS SECRETARY OF STATE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a content-based restriction on truthful, non-misleading commercial speech is subject to strict scrutiny where, as here, that restriction is not intended to prevent commercial harms or otherwise protect a fair bargaining process.

2. Whether a law authorizing the resident-activated restriction of truthful, non-misleading commercial speech is constitutional under the Central Hudson test where, as here, the restriction is both substantially underinclusive and content-based.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR CERTIORARI

Petitioners, Patricia Anderson, Michael A. Hosein, and Stephen Parker, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-17a) was entered on June 25, 2002, and is reported at 294 F.3d 453 (2d Cir. 2002). The opinion of the United States District Court for the Eastern District of New York (App. 20a-26a) was entered on June 20, 2001, and is not reported.

JURISDICTION

The court of appeals entered its opinion and judgment on June 25, 2002. On September 17, 2002, Justice Ginsburg granted petitioners' application for an extension of time to file their petition for certiorari until October 23, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

New York Real Property Law § 442-h(3) provides:

> If the secretary of state determines that some owners of residential real property within a defined geographic area are subject to intense and repeated solicitation by real estate brokers and salespersons to place their

property for sale with such real estate brokers or salespersons, or are subject to intense and repeated solicitation by other persons regularly engaged in the trade or business of buying and selling real estate to sell their real estate, the secretary of state may adopt a rule establishing a cease and desist zone, which zone shall be bounded or otherwise specifically defined in the rule. After the secretary of state has established a cease and desist zone, the owners of residential real property located within the zone may file an owner's statement with the secretary of state expressing their wish not to be solicited by real estate brokers, salespersons or other persons regularly engaged in the trade or business of buying and selling real estate. The form and content of the statement shall be prescribed by the secretary of state. After a cease and desist zone has been established by the secretary of state, no real estate broker, salesperson or other person regularly engaged in the trade or business of buying and selling real estate shall solicit a listing from any owner who has filed a statement with the secretary of state if such owner's name appears on the current cease and desist list prepared by the secretary of state. The prohibition on solicitation shall apply to direct forms of solicitation such as the use of the telephone, the mail, personal contact and other forms of direct solicitation as may be specified by the secretary of state.

INTRODUCTION

New York Real Property Law 442-h(3) authorizes the Secretary of State of New York to establish cease-and-desist zones within which owners of residential property may inform the State that they do not wish to receive real estate solicitations. The law establishes a separate mechanism to punish real estate brokers and agents who solicit such residents by mail, telephone, or in-person. This restriction on

the freedom to engage in truthful, non-deceptive communication is strictly limited to real estate professionals. Thus, long distance carriers, stockbrokers, insurance salespersons and all other solicitors remain completely unrestricted in their solicitation efforts.

Petitioners challenged the constitutionality of this law on grounds (a) that it is a content-based restriction of truthful, non-misleading commercial speech and (b) that it is concededly underinclusive because it serves a general government interest (here, privacy) by prohibiting only speech of disapproved content by certain speakers. Petitioners asserted that the law should receive strict judicial scrutiny and, in the alternative, that the State failed to establish a "close fit" between the law and its purpose, as required under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980).

The Second Circuit rejected petitioners' assertion that the law is subject to strict scrutiny. Relying exclusively on the State's interest in protecting residential privacy, the court of appeals held that strict scrutiny does not apply to a content-based restriction on truthful, non-misleading commercial speech. Under the court's approach, strict scrutiny does not apply even when a restriction purports to serve a government purpose that is unrelated to commercial harms (such as fraud or deception) and that is far broader than the scope of the restriction. That holding is in significant tension with recent decisions of this Court which indicate that strict scrutiny should apply in such circumstances. See, *e.g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501 (1996); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992).

At a minimum, the holding reflects continuing confusion in the federal courts about the standard of judicial scrutiny applicable to laws imposing content-based restrictions on truthful, non-misleading commercial speech "for reasons unrelated to the preservation of a fair bargaining process" or the prevention of "commercial harms." *44 Liquormart*, 517

U.S. at 501. Lower courts are uncertain whether this Court's decisions require strict or intermediate scrutiny in such cases. App. 8a-9a. This case is an excellent vehicle for clarification of the substantial, persistent question whether strict scrutiny applies to content-based restrictions on truthful, non-deceptive commercial speech.

The Second Circuit also held that section 442-h(3) survives intermediate scrutiny under *Central Hudson*. The law is concededly underinclusive – that is, it bars only real estate solicitations without addressing the identical impact on privacy caused by solicitations from, *inter alia*, long distance carriers, stockbrokers, or insurance salespersons. In addition, content-neutral alternatives that fully serve the State's interest are available (*e.g.*, authorizing residents to elect not to be solicited by any person). The Second Circuit nonetheless concluded that there is a "reasonable fit" between the law and the State interest in protecting residential privacy. It read this Court's decisions as approving underinclusive, content-based restrictions on truthful speech, as long as that speech is commercial. App. 12a-14a.

This holding conflicts with decisions of this Court, most notably *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993). It is also irreconcilable with the decision of the Seventh Circuit in *Pearson* v. *Edgar*, 153 F.3d 397 (7th Cir. 1998). There, the Seventh Circuit struck down a state law authorizing residents to elect not to receive real estate solicitations, precisely because it was an underinclusive, content-based restriction on truthful, non-misleading speech. This Court should grant the petition to resolve the important and recurring question whether an underinclusive, content-based restriction satisfies *Central Hudson*'s requirement that restrictions on truthful speech must be narrowly tailored to address an important state interest.

Finally, in holding that there is a reasonable fit between New York's underinclusive, content-based law and its purpose, the Second Circuit relied heavily on the fact that the

restriction is "the kind of resident-activated restriction that was endorsed by" this Court. App. 12a. In fact, this holding cannot be reconciled with the decisions of this Court relied upon by the court of appeals. In *Rowan* v. *United States Post Office Department*, 397 U.S. 728 (1970), *Watchtower Bible & Tract Society* v. *Village of Stratton*, 122 S. Ct. 2080 (2002), and *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), this Court took great pains to make clear that it was approving resident-activated restrictions on speech that were *content-neutral*. Content-based restrictions, in contrast, are "presumptively invalid." *R.A.V.*, 505 U.S. at 382. In addition, the decision conflicts with the Seventh Circuit's decision in *Pearson* and with other decisions recognizing the central significance of content-neutrality when the government establishes a resident-activated mechanism. See 153 F.3d at 405; cases cited *infra* at 27-29.

State regulators are increasingly turning to resident-activated mechanisms to prevent telephone, mail and in-person solicitations. Resident-activation, however, should not be a tool to circumvent the First Amendment and to allow the government to do indirectly what it may not do directly. Here, the State decided that speech with a disfavored content should be subject to prohibition. This Court therefore should make clear that a State may not indirectly "handicap the expression of particular ideas," by employing a resident-activated restriction applicable only to speech with a particular content. *R.A.V.*, 505 U.S. at 394.

STATEMENT OF THE CASE

In 1969, New York outlawed "blockbusting" – "the practice of soliciting real estate sales and listings by representing that a change in the racial, ethnic or religious, character of a block, neighborhood, or area is underway." App. 2a (citing N.Y. Human Rights Law § 296(3-b)). In 1989, the New York legislature enacted Real Property Law § 442-h, a second law intended to address blockbusting.

Subsection 442-h(3) authorizes New York's Secretary of State, after finding a pattern of intense and repeated solicitation within a defined geographic area, to establish a "cease and desist" zone. N.Y. Real Prop. § 442-h(3).[1] Within such a zone, real estate licensees are forbidden directly to solicit homeowners who have registered with the Secretary, indicating that they do not wish to receive such solicitations. Regulations promulgated pursuant to subsection 442-h define solicitation as "an attempt to purchase or rent or an attempt to obtain a listing of property for sale, for rent or for purchase," and prohibit "use of the telephone, mails, delivery services, personal contact or otherwise causing any solicitation, oral or written" to be left for a property owner or at the owner's residence. N.Y. Comp. Codes R. & Regs. tit. 19, § 175.17(d)(1), *quoted at* App. 5a. Only real estate solicitations are prohibited.

The regulations currently establish five cease-and-desist zones. *Id.* § 175.17(c)(2). "[A]pproximately 20,000 homeowners are on the cease-and-desist list." App. 5a. With respect to these homeowners, as well as anyone else at their one, two, or three family homes (see N.Y. Comp. Code R. & Regs., tit. 19, § 175.17(d)(1)(i), (ii)(e)), the Secretary determines whether a communication is a solicitation by "investigating the content of the communication and the intent of the licensee in sending the communication." App. 5a-6a. "The regulation has been applied broadly to prohibit

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[1] Subsection 442-h(2) authorized the Secretary of State to find that a defined geographic area is subject to blockbusting and to adopt a "nonsolicitation order," forbidding all solicitations of residential real estate listings within that zone. In 1991, the Second Circuit held that that subsection 442-h(2) violates the First Amendment. *See New York State Ass'n of Realtors* v. *Shaffer*, 27 F.3d 834 (2d Cir. 1994). The court held that the Secretary failed to provide evidence of the harm that was alleged to justify the restriction – *viz.*, blockbusting. *Id.* at 842-44. Thus, the court found no "reasonable fit" between the degree of harm and the scope of the restriction. *Id.* at 844.

most communications by licensees to residents located at homes on the cease-and-desist list, and licensees have been found to have violated the regulations by distributing business cards, or having promotional advertisements in mass distributed coupon packs that arrive at homes on the cease-and-desist list." *Id.* at 6a. Significantly, therefore, as a practical matter, the law also prohibits solicitations of residents who have not filed a statement.

Petitioners are real estate professionals licensed by the Department of State. They do business in "areas that have been designated cease-and-desist zones." App. 6a. Petitioners Hosein and Anderson were charged with a disciplinary violation because Hosein mailed a flier to an addressee on the cease-and-desist list for Queen's County. "The flier introduced Hosein to potential clients, and detailed some of the services provided by his company." *Id.* The flier included the following: "If you have considered selling or buying a home now or in the near future, or simply want to find out what your home is worth in today's market, don't hesitate to call." *Id.* This flyer would be lawful in all other parts of New York. *Id.* at 9a. For this communication, however, Hosein and Anderson were charged with violating § 442-h(3) and its implementing regulations, and each paid a $300 fine. *Id.* at 7a. Parker also brought suit as a new sales agent, who has had particular difficulty developing his business as a result of § 442-h(3) and who reasonably fears prosecution for violations the law. *Id.* at 6a.

Invoking 42 U.S.C. § 1983, petitioners filed suit in the Eastern District of New York in February 1999. They alleged that the state law violated their constitutional right to freedom of speech. On cross-motions for summary judgment, the district court granted petitioners' motion. It held that subsection 442-h(3) and the regulations implementing it are unconstitutional. App. 26a.

The district court first held that subsection 442-h(3) is a content-based restriction on speech and therefore that strict

scrutiny applies. App. 22a-23a. It found that the State's interest in protecting homeowner privacy is compelling, but held that the restriction on speech does not "'reasonably fit' with the problem it seeks to address." *Id.* at 23a (citing *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980)). The court concluded that the content-based restriction was "underinclusive" because it singled out real estate solicitation and did not proscribe solicitation by other commercial or non-commercial solicitors. *Id.* at 24a.

The court expressly ruled that the State had "not made a showing that solicitation by realtors causes greater harm to homeowners' privacy interests than do other forms of commercial speech that broadcast through like media sources."[2] App. 25a. See *id.* ("it remains unclear how a statute proscribing solicitation by realtors only would accomplish the desired objective of safeguarding homeowner privacy"). Finally, the court concluded that the State had failed to carry its burden of showing that less restrictive, content-neutral solutions were unavailable. *Id.* The district court did not address the State's argument that the provision furthered its interest in preventing blockbusting or petitioners' counter-argument that the evidence of blockbusting was even scantier than in *Shaffer*, 27 F.3d at 842.

The Second Circuit reversed. It acknowledged that petitioners' speech is "lawful and not misleading," App. 9a, and that the restrictions imposed by the law are content-based, *id.* at 9a, 13a. Nonetheless, it held that *Central Hudson*'s intermediate level of scrutiny applies. The Second Circuit cited decisions of this Court that raise serious questions about whether the *Central Hudson* standard applies to truthful, non-

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[2] This and other references in the decision to "realtors" were apparently intended to encompass all real estate licensees. The term "REALTOR," however, is a registered, collective membership mark of the National Association of Realtors. Properly used, the term "REALTOR" applies only to those real estate licensees who are members of the Association.

deceptive commercial speech, especially when the reasons for the restriction are unrelated to the preservation of a fair bargaining process. *Id.* at 8a-9a. It observed, however, that this Court has never expressly held that the *Central Hudson* test does not apply to content-based restrictions on truthful, non-deceptive commercial speech because in each case, this Court invalidated the state statute at issue by applying intermediate scrutiny. *Id.* at 9a. Thus, the Second Circuit declined to apply strict scrutiny in this case.

The court then applied *Central Hudson's* framework for considering whether restrictions on commercial speech are constitutional. First, the court assessed the State's justifications for restricting petitioners' lawful, non-misleading speech. App. 9a. The State claimed that the restrictions were justified by its substantial interests in protecting homeowner privacy and in preventing blockbusting. As noted *supra* note 1, however, in *Shaffer*, the Second Circuit had deemed the evidence of blockbusting inadequate to support a real estate solicitation ban in designated areas. In this case, based on a similar record, the court declined to determine whether the speech restrictions could be justified by the State's interest in preventing blockbusting. App. 10a.[3] Instead, the court held that the

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[3] In *Shaffer*, the court held that "the failure of the Secretary to provide direct and concrete evidence that the evil that the restriction purportedly aims to eliminate does, in fact, exist will doom the nonsolicitation regulation under *Central Hudson*." 27 F.3d at 842. Petitioners showed that here, as in *Shaffer*, *id.* at 843, the Secretary had not done follow-up investigations of blockbusting allegations or produced empirical evidence of declining property values or churning. The Secretary has prosecuted only a single case of blockbusting against a New York real estate professional in 20 years and did not even mention blockbusting in the 1999 rulemakings re-adopting cease-and-desist zones for Queens and certain Nassau and Bronx County communities. J.A. 363-67, 271-75, 276-81, 282-86, 121. On this record, it is not surprising that neither lower court relied on the State's interest in preventing blockbusting to justify the speech abridgement at issue.

State's interest in protecting residential privacy is substantial and, by itself, justifies the State's content-based restriction on speech. *Id.*

The court recognized that the State has the burden of demonstrating that there is "a reasonable fit between the legislature's ends and the means chosen to accomplish those ends." App. 11a (citing *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 556 (2002)). However, it found such a fit here. Specifically, the court held that "the harm to homeowners' privacy from real estate solicitations is real, and that the cease-and-desist zones advance that interest directly and to a material degree." App. 12a. The court also concluded that the fit between the goal (protecting homeowner privacy) and the means (prohibiting all real estate solicitation but no other solicitation) was reasonable. Rejecting petitioners' argument that the State had singled out real estate solicitation for unfavorable treatment based on its content, the court found that a law that authorized residents to prohibit *only* real estate solicitation is analogous to laws approved by this Court. *Id.* (citing *Watchtower Bible*, 122 S.Ct. at 2091; *Rowan*, 397 U.S. at 737; *Playboy Entm't Group*, 529 U.S. at 815).

Finally, the court held that "underinclusiveness will not necessarily defeat a claim that a state interest has been materially advanced," App. 13a. In so doing, the court relied in part on the analysis in *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 478 U.S. 328, 342-43 (1986), without noting that this Court has discredited that analysis.[4] The court also distinguished *Discovery Network*, 507 U.S. at 418, on the ground that "the restriction applies only to those seeking insulation from [real estate] solicitations, and [thus] the Plaintiffs' objection relies on the distinction *among* categories

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[4] *See 44 Liquormart*, 517 U.S. at 509 ("[t]he reasoning in *Posadas* does support the State's argument, but, on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis").

of commercial solicitations, not between commercial and non-commercial solicitations." App. 15a.

The court concluded that the record contained sufficient evidence of harassing residential real estate solicitation to warrant the content-based restriction on truthful, non-misleading speech contained in subsection 442-h(3). Thus, despite the State's failure to demonstrate that real estate solicitation has a different impact on privacy than other commercial solicitation, the court held that the law does not violate the Constitution.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN SUBSTANTIAL TENSION WITH DECISIONS OF THIS COURT AND RAISES THE IMPORTANT, RECURRING QUESTION OF THE APPLICATION OF *CENTRAL HUDSON* TO CONTENT-BASED RESTRICTIONS ON TRUTHFUL, NON-MISLEADING COMMERCIAL SPEECH.

In recent cases, individual justices, and on occasion a majority of this Court, have stated the position that *Central Hudson* should *not* apply to content-based restrictions on truthful, non-misleading commercial speech. At a minimum, a majority of justices has expressed the view that strict scrutiny should apply when the purpose of the law is unrelated either to the prevention of commercial harms, such as fraud and deception, or to the protection of a fair bargaining process. See, *e.g.*, *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 184 (1999) (Stevens, J.); *id.* at 197 (Thomas, J., concurring in judgment); *44 Liquormart*, 517 U.S. at 501, 510-14 (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and in judgment); *id.* at 518 (Thomas, J.,

concurring in the judgment).[5] In *R.A.V.*, the Court explained that the government may make content-based distinctions within the category of commercial speech based only on "the characteristics of commercial speech that justif[y] depriving it of full First Amendment Protection." 505 U.S. at 388.

In each commercial speech case in which the issue was raised, however, this Court *reserved* the question whether strict scrutiny applies because the Court concluded that the restriction in question could not satisfy even the intermediate-scrutiny standard. See *Thompson* v. *Western States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002) (describing the challenge to *Central Hudson*, but finding "no need in this case to break new ground"); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 554-55 (2002) (same); *Greater New Orleans*, 527 U.S. at 184 (same); *44 Liquormart*, 517 U.S. at 504 (same); *Discovery Network*, 507 U.S. at 416 n.11 (same).

These decisions have led to uncertainty and inconsistencies in the application of *Central Hudson* to truthful, non-deceptive commercial speech. This case illustrates the point. Here, petitioners argued, and the district court held, that subsection 442-h(3) is a content-based restriction on speech and that this Court's decisions require the application of strict scrutiny. App. 22a-23a. The court of appeals reversed. It was of the wholly different view that this Court's recent decisions actually constitute a "reject[ion of] the argument

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[5] *See also Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 571-72 (2001) (citing "continuing concerns that the [*Central Hudson*] test gives insufficient protection to truthful, nonmisleading commercial speech") (Kennedy and Scalia, JJ., concurring); *id.* at 572 ("I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial'") (Thomas, J., concurring); *Discovery Network*, 507 U.S. at 416 n.11 (Stevens, J.).

that strict scrutiny should apply to regulations of commercial speech that are content-specific." *Id.* at 9a.[6]

That decision cannot be reconciled with the Court's analysis in its recent decisions. In fact, a majority of this Court has concluded that *Central Hudson* does not state the appropriate test for content-based restrictions on non-deceptive commercial speech. In *44 Liquormart*, Justice Stevens, joined by Justices Kennedy and Ginsburg, explicitly rejected the argument that "*all* commercial speech regulations are subject to a similar form of constitutional review." 517 U.S. at 501. These justices concluded that the justifications for intermediate scrutiny of laws constraining commercial speech simply are not applicable to content-based restrictions on truthful, non-misleading commercial speech that do not address commercial harms. *Id.* "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.* See *id.* at 502-03 ("[i]t is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.' Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms") (citations omitted).[7] In sum,

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[6] In disagreement with the Second Circuit, other lower courts have applied strict scrutiny to content-based commercial speech restrictions. *See, e.g., MD II Entm't, Inc.* v. *City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994); *Citizens United for Free Speech II* v. *Long Beach Township Bd. of Commissioners*, 802 F. Supp. 1223, 1232 n.7 (D.N.J. 1992) ("[i]t is clear from the Supreme Court's recent decision in *R.A.V.*, that commercial speech must be protected by the usual strictures against content-based distinctions").

[7] *Compare* 517 U.S. at 501 ("[w]hen a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive

the opinion concluded that "the State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated,' rather than the 'commercial aspect of [it].'" *Id.* at 499 (quoting *Linmark Assoc.* v. *Willingboro*, 431 U.S. 85, 96 (1977)).

Thus, it appears that these three justices would hold that content-based restrictions on truthful, non-misleading speech that are not directed at "commercial harms" are subject to strict scrutiny. Two additional justices appear to have gone even further. They have indicated that strict-scrutiny analysis should apply to *all* truthful, non-misleading commercial speech. See, *e.g.*, *44 Liquormart*, 517 U.S. at 522 (asserting that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech") (Thomas, J., concurring); *id.* at 517 (the *Central Hudson* test has "nothing more than policy intuition to support it") (Scalia, J., concurring).

This trend in the Court's jurisprudence would bring the law governing commercial speech into harmony with its general approach to the First Amendment. Content-based restrictions on speech are highly suspect. Indeed, a regulation restricting speech because of its content will rarely ever be permissible. See *Playboy Entm't Group*, 529 U.S. at 813 ("[s]ince [the law] is a content-based speech restriction, it can stand only if it satisfies strict scrutiny"); *R.A.V.*, 505 U.S. at 382 ("[c]ontent-based regulations are presumptively invalid").

The Court's decision in *R.A.V.* reflects the growing congruence between the standards governing content-based restrictions of commercial speech and those governing content-based restrictions generally. In *R.A.V.*, the Court explained the difference between constitutional and

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sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review").

unconstitutional content-based distinctions in commercial-speech restrictions:

> [A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion. [*Id.* at 388-89. (citations omitted)]

In *R.A.V.*, the Court applied strict scrutiny to content-based regulation of wholly *unprotected* categories of speech, such as fighting words and obscenity. *A fortiori*, this decision should require application of strict scrutiny to a content-based restriction on the plainly protected category of commercial speech that does not address commercial harms.

The Court's cases appear to recognize that *Central Hudson*'s balancing test is insufficiently rigorous to evaluate the constitutionality of content-based restrictions on truthful, non-misleading commercial speech. Moreover, the Court has noted that "judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans*, 527 U.S. at 184. See also Alex Kozinski & Stuart Banner, *Who's Afraid Of Commercial Speech?* 76 Va. L. Rev. 627, 631 (1990) ("cases have been able to shed little light on *Central Hudson*, aside from standing as ad hoc subject-specific examples of what is permissible and what is not"); David P. Kasakove, *New York State Ass'n of Realtors, Inc.* v. *Shaffer: When the Second Circuit Chooses Between Free Speech and Fair Housing, Who Wins?* 61 Brook. L. Rev. 397, 409-10 (1995) ("[r]ather than giving much-needed direction to the lower courts, the Supreme Court's case-by-case approach has led to such unpredictability that [u]nless a case has facts very much like those of a prior case, it is nearly impossible to predict the

winner") (internal quotation omitted). The Court should take this opportunity expressly to hold that the First Amendment requires strict scrutiny of content-based restrictions of commercial speech that do not address commercial harms.

This case is an excellent vehicle for delineating the scope of *Central Hudson*. First, the issue was raised and decided below. Indeed, the court below seemed to recognize that the level of scrutiny would be outcome determinative here. Second, the law at issue (subsection 442-h(3)) indisputably presents the question whether strict scrutiny applies to content-based restrictions on truthful, non-misleading speech not directed at commercial harms. The law is content-based because it forbids *real estate solicitations*, and no other solicitations. In addition, the court of appeals relied solely on the State's alleged interest in protecting residential privacy, not on any interest related to *commercial* harms.

Moreover, subsection 442-h(3) would be subject to strict scrutiny under the test of the plurality in *44 Liquormart*, 517 U.S. at 501 (endorsing strict scrutiny where the law "prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process") and *a fortiori*, under the more stringent test of those in concurrence, *id.* at 522-23 (endorsing strict scrutiny of content-based restrictions of commercial speech intended to manipulate consumer choice through suppression of accurate commercial information).

Accordingly, the case gives the Court the opportunity to determine whether content-based restrictions on truthful, non-misleading commercial speech not intended to address commercial harms are subject to strict scrutiny. The Court's numerous discussions of this subject have generated substantial uncertainty and conflict in the lower courts. This Court should grant review to resolve this important and recurring question.

II. ASSUMING INTERMEDIATE SCRUTINY IS APPROPRIATE, THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS BY APPROVING AN UNDERINCLUSIVE, CONTENT-BASED, RESIDENT-ACTIVATED RESTRICTION ON TRUTHFUL, NON-DECEPTIVE SPEECH.

When examining a restriction on commercial speech under *Central Hudson*, courts apply a four-part test: (i) whether the speech concerns lawful activity and is not misleading, (ii) whether the asserted government interest is substantial, (iii) whether the regulation directly and materially advances the government interest asserted, and (iv) whether there is a reasonable fit between the legislature ends and the means chosen to accomplish those ends. *Central Hudson*, 447 U.S. at 566. The government "bears the burden of identifying a substantial interest and justifying the challenged restriction." *Greater New Orleans*, 527 U.S. at 183.

Here, the parties agree that the speech in question is lawful and not misleading and that the government interest – homeowner privacy – is substantial. Thus, the issue is whether the State has carried its burden on the third and fourth elements of the test by demonstrating that the law materially advances the government interest and that there is a "reasonable fit" between the law's restriction on speech and that interest. *Discovery Network*, 507 U.S. at 417 (quoting *Board of Trs.* v. *Fox*, 492 U.S. 469, 480 (1989)). See also *Fox*, 492 U.S. at 480 (the regulation should be "narrowly tailored").

The restriction on speech at issue is acknowledged to be underinclusive -- that is, it addresses only one aspect of the intrusion on homeowner privacy by mail, telephone, and in-person solicitation. The Second Circuit nonetheless held that this content-based restriction on speech passes muster under the third and fourth prongs of the *Central Hudson* test. That decision conflicts with a decision of the Seventh Circuit on

very similar facts, holding that, in these circumstances, "underinclusiveness indicate[s] a lack of reasonable fit." *Pearson* v. *Edgar*, 153 F.3d 397, 404 (7th Cir. 1998) (citing *Discovery Network*, 507 U.S. at 417-18). It also conflicts with decisions of this Court. The issue of whether an underinclusive, content-based restriction of commercial speech is unconstitutional is recurring and important. Yet the lower courts are in a state of disarray that warrants this Court's attention.

The decision below conflicts with *Pearson* and with decisions of this Court in another important regard. Specifically, the Second Circuit held that an underinclusive, content-based law satisfied the "reasonable fit" test of *Central Hudson* because it employed the device of resident activation. App. 12a. By contrast, applying decisions of this Court, the Seventh Circuit held that resident-activated restrictions on speech save underinclusive laws only when the restriction on speech is content-neutral. Governments experimenting with resident-activated devices to protect privacy need to know whether such a device justifies a content-based restriction on speech or whether the Constitution forbids the State to use such a device to single out speech with a particular content for unique disapprobation and punishment.

A. The Second Circuit's Decision Allowing An Underinclusive, Content-Based Restriction On Speech Conflicts With A Decision Of The Seventh Circuit And With This Court's Decisions.

1. In a case involving a restriction on real estate solicitation that is virtually identical to the New York law at issue here, the Seventh Circuit held that the law's "underinclusiveness indicated a lack of reasonable fit" under the *Central Hudson* test. See *Pearson*, 153 F.3d at 404. At issue in *Pearson* was an Illinois law "allow[ing] homeowners to notify real estate agents that they do not wish to be solicited." *Id.* at 399. Like the New York law, the Illinois law was passed to prevent

blockbusting; protection of homeowner privacy was first offered as a justification in litigation challenging the law. Ironically, after its passage, a community group in the Beverly neighborhood of Chicago "canvassed the neighborhood to find homeowners who did not want to be solicited by real estate agents," in order to hinder real estate agents' efforts to market neighborhood homes to minority purchasers. *Id.* Real estate professionals challenged the law as a violation of the First Amendment. *Id.*

The Seventh Circuit held that under this Court's decision in *Discovery Network*, the Illinois law violated the First Amendment.[8] After concluding that the evidence of blockbusting was inadequate to justify the law, the Seventh Circuit found that the State's interest in residential privacy was substantial. The court held, however, that the law did not satisfy the requirement of a "reasonable fit" between the Illinois statute and the protection of privacy, because it was underinclusive and because it undervalued commercial speech. *Id.* at 103.

The Seventh Circuit first pointed out that the law at issue in *Discovery Network* – banning commercial newsracks and leaving non-commercial newsracks unregulated – "was underinclusive – it only attacked part of the problems of safety and esthetics caused by newsracks." *Id.* at 404. The court of appeals read *Discovery Network* to hold that

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[8] The Seventh Circuit initially affirmed the district court's denial of a preliminary injunction and held that the law did not violate the First Amendment. *See Curtis* v. *Thompson*, 840 F.2d 1291 (7th Cir. 1988). On remand, the district court dismissed the case. The Seventh Circuit affirmed, and the plaintiffs petitioned for a writ of certiorari. *Pearson* v. *Thompson*, 1989 WL 88367 (N.D. Ill. July 26, 1989), *aff'd*, 955 F.2d 46 (7th Cir. 1992), *vacated sub nom. Pearson* v. *Edgar*, 507 U.S. 1015 (1993). This Court granted the petition, vacated the Seventh Circuit's decision, and remanded the case "for further consideration in light of *Cincinnati* v. *Discovery Network, Inc.*, *ante*, p. 410." *Pearson v. Edgar*, 507 U.S. 1015, 1015 (1993).

"underinclusiveness indicate[s] a lack of reasonable fit." *Id.* The court explained that previously it had "defer[red]" to the State's "judgment that real estate solicitation poses a special problem to residential privacy." *Id.* After *Discovery Network*, however, the court recognized that "the distinction between real estate solicitation and other types of solicitation is not plausible absent evidence that real estate solicitation poses a particular threat to residential privacy" that is not posed by other commercial solicitation. *Id.*

The Seventh Circuit stated that there was no evidence that real estate solicitation uniquely harms residential privacy, and held that "[a]bsent such evidence, a mechanism where homeowners can reject real estate solicitation but not other kinds of solicitation cannot be said to advance the interest in residential privacy 'in a direct and material way.'" *Id.* (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993)). "Severe underinclusiveness is not forgivable after *Discovery Network*'s condemnation of unjustified limited bans if the underinclusiveness indicates poor fit." *Id.* See *id.* at 403 ("if the state were concerned about the intrusion of solicitation on residential privacy, it could have addressed the problem more effectively by allowing homeowners to reject solicitation of any commercial enterprise, not just of real estate agents").

Indeed, in *Pearson*, the Seventh Circuit acknowledged that its former reliance on *Rowan*, 397 U.S. 728, was "weakened by *Discovery Network*'s emphasis on reasonable fit." *Pearson*, 153 F.3d at 404. In *Rowan*, "a homeowner could prevent *any* material from entering his home, even a 'dry goods catalogue,' if the homeowner deemed the material offensive." *Pearson*, 153 F.3d at 404. Thus, "*Rowan* involved no governmental distinction between one kind of offensive material and another – all distinctions were made by the homeowner." *Id.* In contrast, under the Illinois law, "the state, not the homeowner, has made the distinction between real estate solicitations and other solicitations without a logical privacy-based reason." *Id.* Thus, the court concluded,

"[w]e can no longer, after *Discovery Network*, place the interest in residential privacy above the interest in logical distinctions in speech restrictions absent some showing that the restriction reasonably fits the justification." *Id.*

Finally, the court concluded that its prior decision had significantly undervalued commercial speech in a way now prohibited by *Discovery Network*. *Discovery Network* required the court carefully to scrutinize content-based restrictions of commercial speech; and the court was unable to find that the State's interest in protecting residential privacy was "absolutely greater" than the First Amendment right at issue. *Pearson*, 153 F.3d at 405.

Had the Seventh Circuit addressed the New York law at issue here, it would have struck that law down. Under the New York law, precisely as under the Illinois law, the State has distinguished real estate solicitations from other commercial and non-commercial solicitations for reasons unrelated to privacy. The record in this case, like the record in *Pearson*, is devoid of evidence that real estate solicitation is intrusive upon homeowner privacy in ways that other solicitation is not. In this case, the State never compared the problems caused by real estate solicitation with the problems caused by other kinds of solicitations, and thus never satisfied the *Pearson* court's requirement that the State demonstrate unique harms caused by the disapproved type of solicitation. Indeed, the district court below expressly *found* that the State had "not made a showing that solicitation by realtors causes greater harm to homeowners' privacy interests than do other forms of commercial speech that broadcast through like media sources." App. 25a. And here, as in *Pearson*, it is "the state, not the homeowner," that is distinguishing offensive from inoffensive solicitation based on its content. 153 F.3d at 404. The two decisions cannot be reconciled.

2. As *Pearson* reveals, the decision below also conflicts with the decision of this Court in *Discovery Network*. There, the government argued that there was a reasonable fit

between its content-based restriction of commercial speech (the ban on newsracks dispensing *commercial* handbills) and its interest (improving safety and esthetics) because *any* decrease in the total number of newsracks served the government interest. This Court rejected that argument, stating that the distinction between commercial and non-commercial newsracks "bears no relationship *whatsoever* to the particular interests the city has asserted." 507 U.S. at 424. As the Court explained, with respect to the asserted "interest in esthetics," the commercial "newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks." *Id.* at 425.

Moreover, the Court noted that Cincinnati "has not asserted an interest in preventing commercial harms by regulating the information distributed by [commercial] newsracks, which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech." *Id.* at 426. Thus, the Court concluded that "[i]n the absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing 'commercial handbills.'" *Id.* at 428. Cf. *44 Liquormart*, 517 U.S. at 512 n.20 (in *Discovery Network*, "we assumed that States could prevent all newsracks from being placed on public sidewalks, but nevertheless concluded that they could not ban only those newsracks that contained certain commercial publications").

Similarly here, the distinction between real estate solicitations and other commercial solicitations "bears no relationship whatsoever" to privacy, the sole state interest relied on by the court of appeals. The intrusion on privacy arises from the arrival of the solicitation, not its content. The invasion is the same whether the contact comes from a real

estate licensee or some other person. Cf. *Watchtower Bible*, 122 S. Ct. at 2091, ("[t]he annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit"). Neither the New York legislature nor the court below cited any unique commercial harm prevented by banning real estate solicitations, and the record contains no such evidence.[9]

Equally to the point, the provision makes no effort to distinguish among mail, telephone and in-person real estate solicitations whose intrusive effects are entirely distinct. Cf. *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) ("the 'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned'") (citation omitted); *Edenfield* v. *Fane*, 507 U.S. 761, 776 (1993) (if potential clients are not receptive to a CPA's "initial telephone solicitation, they need only terminate the call. Invasion of privacy is not a significant concern"). For this reason also, the incremental benefit to privacy interests provided by the ban does not justify the content-based ban on commercial speech.[10] See

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[9] Indeed, the record shows that residents complained about non-real estate solicitations. J.A. 1835, 1840-50, 1851-54, 1855-58.

[10] In support of its contention that this underinclusiveness does not defeat a claim that a State interest has been materially advanced, the Second Circuit cited *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 478 U.S. 328 (1986), *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418 (1993), and *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981). This reliance is misplaced. In *44 Liquormart*, this Court explained that the *Posadas* court "clearly erred in concluding that it was 'up to the legislature' to choose suppression [of speech] over a less speech-restrictive policy," saying that *Posadas* "cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available." 517 U.S. at 509. Similarly, in *Edge*, the Court upheld a federal statute permitting only broadcasters located in States with legalized lotteries to air lottery advertising. That statute "was designed to regulate advertising about an activity that had been deemed illegal in the

Discovery Network, 507 U.S. at 426 (explaining the "fallacy of the city's argument that a reasonable fit is established by the mere fact that the entire burden imposed on commercial speech by its newsrack policy may in some small way limit the total number of newsracks on Cincinnati's sidewalks"); *id.* at 417 ("[t]he fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition").[11]

For the same reasons, the Second Circuit's decision conflicts with *Carey* v. *Brown*, 447 U.S. 455 (1980). In that case, citing its interest in residential privacy, the State enacted a statute prohibiting all picketing except labor picketing. The Court held that the statute was unconstitutional, because "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy." *Id.* at 465. The statute "broadly permit[ed] all peaceful labor picketing notwithstanding the disturbances it would undoubtedly engender," while making "no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest." *Id.* See also *Police Dep't* v. *Mosley*, 408 U.S. 92 (1972) (same); *Greater New Orleans*, 527 U.S. at 184-87 (federal statute banning

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jurisdiction in which the broadcaster was located," and had to be contrasted with statutes "target[ing] information about entirely lawful behavior." *44 Liquormart*, 517 U.S. at 509 (discussing *Edge*, 509 U.S. at 433-34). Finally, in *Metromedia*, the city restricted speech (commercial billboards) by restricting the *location* of commercial billboards (prohibiting off-site billboards while allowing on-site billboards). 453 U.S. at 507-12. None of these decisions supports the Second Circuit's authorization of an underinclusive restriction where, as here, the law indicates the State's disapproval of speech with a specified content.

[11] *See also* Robert T. Cahill, Jr., *City of Cincinnati v. Discovery Network, Inc.: Towards Heightened Scrutiny for Truthful Commercial Speech*, 28 U. Rich. L. Rev. 225, 245-46 (1994) (asserting that *Discovery Network* signals an increasingly in-depth analysis of the means-ends fit).

casino gambling advertising by private operators violates the First Amendment, *inter alia*, because it permits advertising by tribal casinos).

The Second Circuit's decision that New York's law is narrowly tailored to address the State's interest in residential privacy thus conflicts with this Court's decisions. Content-neutral alternatives were available that would have fully achieved the State's purpose (*i.e.*, banning certain methods of solicitation and/or solicitation by all speakers). As this Court summarized in *R.A.V.*

> [t]he dispositive question . . . is whether content discrimination is reasonably necessary to achieve [the government's] compelling interests; it plainly is not. *An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect.* In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians . . . are entitled to express that hostility – but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree. [505 U.S. at 395-96 (footnote omitted) (emphasis supplied).][12]

Content-based, underinclusive restrictions on truthful, non-misleading commercial speech raise a warning flag, signaling the courts that the law's real purpose may be to suppress certain ideas. Neither subsection 442-h(3) nor its legislative

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[12] *See also* Laurence Tribe, *American Constitutional Law* § 12-3, at 800 (2d ed. 1988) (content neutrality "may sometimes result, perhaps ironically, in the *reduced* protection of speech, since one method of 'equalizing' is not to permit more speech but rather to adopt even more suppressive content-neutral regulations") (citing Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 205 (1983)).

history hints at any State concern for residential privacy; nor did the State offer any privacy-based justification for restricting real estate solicitations and not others. The law has nevertheless been used to justify the State's antipathy to particular speakers with a disfavored message concerning lawful activity that is not misleading. Cf. *Metromedia*, 453 U.S. at 510 (aesthetic judgments must be carefully examined "to determine if they are only a public rationalization of an impermissible purpose"). Under this Court's decisions applying *Central Hudson* to underinclusive, content-based limitations on commercial speech, subsection 442-h(3) is unconstitutional.

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In sum, the Second Circuit's decision conflicts with decisions of other lower courts and with numerous decisions of this Court, making clear that content-based, underinclusive restrictions on truthful, non-misleading commercial speech are unconstitutional where less restrictive, content-neutral alternatives exist. This Court should grant the petition to resolve the conflict and uncertainty about whether content-based, underinclusive restrictions on truthful, non-misleading commercial speech are constitutional under *Central Hudson*.

B. The Decision Creates A Conflict In The Courts Of Appeals And Is In Tension With Decisions Of This Court Regarding The Constitutionality Of Resident-Activated Mechanisms That Implement Content-Based Restrictions Of Speech.

The statutory provision at issue creates a mechanism that authorizes residents in specially designated areas to register and stop real estate solicitations – and only real estate solicitations. The Second Circuit acknowledged that New York has singled out real estate solicitation for negative treatment. The court nonetheless concluded that the provision was not unconstitutional, content-based discrimination. The court concluded that the law satisfied the "reasonable fit"

requirement of *Central Hudson* by employing the kind of "resident-activated restriction" that this Court had "endorsed." App. 12a.

The Second Circuit saw nothing wrong with the State's circumvention of the First Amendment's ban of content-based restrictions on speech by establishing a mechanism that facilitates individuals' refusal to hear speech containing specified content (and prohibits some willing listeners from hearing it, see N.Y. Comp. Code R. & Regs. tit. 19, § 175.17(d)(1)(i), (ii), (e)). Its decision, however, is contrary to that of other lower courts and inconsistent with this Court's cases addressing laws creating resident-activated restrictions on speech.

First, the decision conflicts with the Seventh Circuit's decision in *Pearson*, holding that the resident-activated restrictions on real estate solicitation in the Illinois law are unconstitutional.[13] See *supra* at 19-21. Cf. also

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[13] Similarly, in cases involving laws restricting telephone solicitation, several courts have held that provisions forbidding callers to use artificial or pre-recorded voices to deliver commercial messages without prior caller consent are unconstitutional. The courts acknowledged that the content-based restriction protected residential privacy, but struck down the laws because the government failed to demonstrate that commercial recorded advertisements intrude upon privacy in some way that is different from other recorded messages. *See Lysaght* v. *New Jersey*, 837 F. Supp. 646, 652 (D.N.J. 1993) ("the Supreme Court rejected the government's reliance on its interest in protecting the public from 'offensive' speech, and specifically declined 'to recognize a distinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech'") (footnote omitted); *Moser* v. *FCC*, 826 F. Supp. 360 (D. Or. 1993). The Ninth Circuit reversed *Moser*, 46 F.3d 970 (9th Cir. 1995), but solely on the ground that the law was not mandatory – *i.e.*, that the FCC was not required to ban recorded advertisements absent advance consent and left to another day the constitutionality of the regulations doing precisely that. The government can outlaw all recorded messages regardless of content, see *Van Bergen* v. *Minnesota*, 59 F.3d 1541, 1546 (8th Cir. 1995) (upholding Minnesota law doing so). The government may not, however,

South/Southwest Ass'n of Realtors v. *Village of Evergreen Park*, 109 F. Supp. 2d 926, 928 (N.D. Ill. 2000) (upholding content-neutral law authorizing residents to preclude any solicitation as "follow[ing] the *Pearson* court's recommendation" because it "does not make an artificial and unjustified distinction between realtors' in-home commercial speech and all other in-home commercial speech").

Second, this Court has made clear that laws establishing and enforcing resident-activated restrictions on speech must be content-neutral. In each case in which such a law has been upheld, the Court has emphasized this point. For example, in *Rowan*, 397 U.S. at 737, the Court considered the constitutionality of a statute authorizing mail customers to require the post office to cease delivering mail from a particular mailer. Although the statute was directed at sexually explicit materials, this Court emphasized in upholding the law that, in reality, the mail customer could stop delivery from any mailer for any reason and therefore that the resident-activated restriction was content-neutral. See *id.* ("the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalogue because he objects to the contents – or indeed the text of the language touting the merchandise"). See *Pearson*, 153 F.3d at 404 ("*Rowan* involved no governmental distinction between one kind of offensive material and another – all distinctions were made by the homeowner").

Similarly, in *Playboy Entertainment Group*, the Court struck down section 505 of the Telecommunications Act of 1996, a provision requiring cable television operators providing channels dedicated to sexually-oriented programming to fully scramble or block those channels (*i.e.*, to prevent any signal bleed) or limit their transmission to hours when children are unlikely to be viewing. The Court

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enact and enforce a content-based restriction on speech through the indirect mechanism of a resident-activated restriction.

held that the provision was a content-based regulation of speech that was not narrowly tailored because the statute itself contained a less restrictive alternative – section 504, a provision requiring a cable operator, upon request by a subscriber, to fully scramble or block any channel that the subscriber did not wish to receive. Of particular importance here, the Court explained that "[s]ection 504 [i]s content neutral and would be less restrictive of Playboy's First Amendment rights." 529 U.S. at 810. Cf. *Watchtower Bible*, 122 S. Ct. at 2091 ("the posting of 'No Solicitation' signs . . . coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener").

An opt-out mechanism survives constitutional scrutiny only if it is "content-neutral, narrowly drawn, serve[s] a significant governmental interest, and leave[s] open ample alternative channels of communication." Deborah L. Hamilton, *The First Amendment Status of Commercial Speech: Why the FCC Regulations Implementing the Telephone Consumer Protection Act of 1991 Are Unconstitutional*, 94 Mich. L. Rev. 2352, 2383 (1996). Here the resident-activated mechanism is neither content-neutral nor narrowly drawn: Residents may opt not to receive real estate solicitations, but no others. The law reflects and enforces the State's disapproval of speech of a specified content. It is therefore unconstitutional.

The use of resident-activated mechanisms to impose restrictions on communications is an increasingly popular government tool, because it allows individuals to make choices about the communications that they will receive in the home. But where, as here, the government enacts a resident-activated mechanism that targets communications with a disfavored content, that law constitutes governmental abridgement and punishment of speech based on its content. This Court should grant the petition to resolve the conflict and hold that resident-activated restrictions on communications

must be content-neutral (*i.e.*, directed at a particular type of communication such as telephone calls or at communication by all speakers).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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October 23, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 01-7954.

PATRICIA C. ANDERSON, MICHAEL A. HOSEIN
and STEPHEN E. PARKER,
Plaintiffs-Appellees,

v.

ALEXANDER F. TREADWELL, as Secretary of State
of the State of New York,
Defendant-Appellant.

Argued April 4, 2002.
Decided June 25, 2002.

Before NEWMAN, KEARSE, and LEVAL, Circuit Judges.

JON O. NEWMAN, Senior Circuit Judge.

This appeal requires us to decide whether a state's regulation of residential real estate solicitations by licensed real estate salespersons violates their free speech rights under the First Amendment. Defendant-Appellant Alexander Treadwell, New York's Secretary of State, appeals from the June 29, 2001, judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, District Judge), granting summary judgment to Plaintiffs-Appellees Patricia Anderson, Michael A. Hosein, and Stephen E. Parker, real estate sales licensees, who challenged the constitutionality of N.Y. Real Prop. Law § 442-h(3)

(McKinney 2001) on its face and as applied, and regulations promulgated under the statute. The District Court ruled unconstitutional subsection 442-h(3) and the regulations establishing "cease-and-desist zones" in which homeowners can elect not to receive at-home real estate solicitations. Judge Platt concluded that the regulatory scheme lacked a "reasonable fit" between the State's alleged interest in homeowner privacy and the means chosen to serve that interest. For the reasons stated below, we reject the Appellees' constitutional challenges and therefore reverse.

Background

New York Human Rights Law § 296(3-b) outlaws "blockbusting"—the practice of soliciting real estate sales and listings by representing that a change in the racial, ethnic, or religious character of a block, neighborhood, or area is underway.[1] As we have previously recognized, "[i]n its most systematic and crudest form, blockbusting entails the 'churning' of a local real estate market, a practice in which real estate brokers engage in frenzied solicitation practices that prey upon the racial and ethnic fears of persons residing in transitional neighborhoods as a means for increasing the volume of residential real estate transactions. While realtors gain the benefit of the commissions generated by the increase in sales, homeowners and communities suffer the detriment of declining property values and neighborhood instability

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[1] N.Y. Exec. Law § 296(3-b) (McKinney 2001) states:

> It shall be an unlawful discriminatory practice for any real estate broker, . . . for the purpose of inducing a real estate transaction . . . to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin, sex, disability, marital status, or familial status of the owners or occupants in the block, neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood or area in which the real property is located . . . .

brought on by panic selling, the fanning of racial tensions and promoting of ethnic stereotypes." *New York State Association of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 835-36 (2d Cir.1994) ("*NYSAR*"). *NYSAR* thus recognized that "blockbusting" is not only the solicitation of homeowners to sell their homes out of fear of changing neighborhood demographics but also the harmful effects that result when such solicitations precipitate home sales.

In 1989, in an effort to enforce its ban on blockbusting, the New York State Legislature enacted Real Property Law § 442-h. As enacted, subsection 442-h(2) allows the Secretary of State to find, after public hearing and investigation, that a defined geographic area is subject to blockbusting, and to adopt a "nonsolicitation order" forbidding all solicitations of residential real estate listings or sales from any homeowner within that zone. Subsection 442-h(3) authorizes the Secretary, upon finding a pattern of intense and repeated solicitations within a defined geographic area, to establish "cease-and-desist zones," within which real estate licensees[2] are forbidden from directing in-home solicitations to homeowners who have registered in advance with the Secretary of State their wish not to receive such solicitations.

In 1991, the New York State Association of Realtors challenged the nonsolicitation orders on First Amendment grounds, and this Court, applying the test for commercial speech, ruled the nonsolicitation regulation promulgated pursuant to subsection 442-h(2) invalid because the Secretary had failed to provide direct and concrete evidence of the harm that was alleged to justify the restriction. *See NYSAR,* 27 F.3d at 842-44. Accordingly, the Court concluded that the

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[2] The prohibition extends not only to real estate brokers and salespersons licensed by the Department of State, referred to collectively as "real estate licensees," but also to real estate speculators, who are "regularly engaged in the trade or business of buying and selling real estate." N.Y. Real Prop. Law § 442-h(3) (McKinney 2001).

Secretary had failed to establish a "reasonable fit" between the degree of the harm and the scope of the restriction. *See id.* at 844.

Under subsection 442-h(3),[3] the Secretary can create cease-and-desist zones in those areas where he determines that "owners of residential real estate property . . . are subject to intense and repeated solicitations by real estate brokers . . . to place their property for sale." In these zones, real estate licensees are prohibited from soliciting a listing from any owner who has filed a statement with the Secretary of State expressing the wish not to be solicited, and whose name appears on the cease-and-desist list. A rule establishing such

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[3] N.Y. Real Prop. Law § 442-h(3)(a) (McKinney 2001) provides:

> If the secretary of state determines that some owners of residential real property within a defined geographic area are subject to intense and repeated solicitation by real estate brokers and salespersons to place their property for sale with such real estate brokers or salespersons, or are subject to intense and repeated solicitation by other persons regularly engaged in the trade or business of buying and selling real estate to sell their real estate, the secretary of state may adopt a rule establishing a cease and desist zone, which zone shall be bounded or otherwise specifically defined in the rule. After the secretary of state has established a cease and desist zone, the owners of residential real property located within the zone may file an owner's statement with the secretary of state expressing their wish not to be solicited by real estate brokers, salespersons or other persons regularly engaged in the trade or business of buying and selling real estate. The form and content of the statement shall be prescribed by the secretary of state. After a cease and desist zone has been established by the secretary of state, no real estate broker, salesperson or other person regularly engaged in the trade or business of buying and selling real estate shall solicit a listing from any owner who has filed a statement with the secretary of state if such owner's name appears on the current cease and desist list prepared by the secretary of state. The prohibition on solicitation shall apply to direct forms of solicitation such as the use of the telephone, the mail, personal contact and other forms of direct solicitation as may be specified by the secretary of state.

a zone is effective for five years, after which the Secretary can re-adopt the rule or it will expire.

Current regulations promulgated pursuant to subsection 442-h(3) establish five cease-and-desist zones, and delineate their boundaries. N.Y. Comp. Codes R. & Regs. tit. 19, § 175.17(c)(2) (2001). The regulations prohibit a real estate licensee from "solicit[ing] the sale, lease or the listing for sale or lease of residential property" from an owner in the cease-and-desist zone who has signed onto the cease-and-desist list. *Id.* § 175.17(c)(1). "Solicitation" is defined as "an attempt to purchase or rent or an attempt to obtain a listing of property for sale, for rent or for purchase,"[4] and the solicitation ban extends to "use of the telephone, mails, delivery services, personal contact or otherwise causing any solicitation, oral or written," to be left for the owner or anyone else at the owner's home address. *Id.* § 175.17(d)(1). The solicitation ban does not cover classified advertising in non-real estate publications, advertisements placed in public view, or radio or television advertisements. *Id.* § 175.17(d)(2). The regulations define residential property as one-, two-, and three-family houses, including co-ops and condos. *Id.* § 175.17(e).

Currently, approximately 20,000 homeowners are on the cease-and-desist list, with more than 14,000 in Queens County. The Secretary determines whether any particular communication is an unlawful solicitation by investigating

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[4] The two uses of the word "purchase" in the definition of "solicitation" are unclear. The first use, covering "an attempt to purchase," apparently refers to a speculator's attempt to purchase a homeowner's home for resale. The second use, covering "an attempt to obtain a listing of property for . . . purchase," is less clear; normally a "listing" refers to a property offered for sale. We need not pursue this aspect of the definition because none of the parties has attached any significance to the definition of "solicitation" or mentioned the uncertainty as to the meaning of "purchase."

the content of the communication and the intent of the licensee in sending the communication. The regulation has been applied broadly to prohibit most communications by licensees to residents located at homes on the cease-and-desist list, and licensees have been found to have violated the regulations by distributing business cards, or having promotional advertisements in mass distributed coupon packs that arrive at homes on the cease-and-desist list.

The Plaintiffs are real estate professionals licensed by the Department of State, offering services in New York, including areas that have been designated cease-and-desist zones by the Defendant. They contend that, in order to obtain real estate listings, they rely upon direct, in-home solicitations, including in-home visits, telephone calls, and literature delivered directly to homeowners. Plaintiff Parker brings the suit as a sales agent reasonably fearing prosecution and risking sanction for violation of subsection 442-h(3). He alleges that he has had particular difficulty developing his business due to this restriction. The Plaintiffs allege that the solicitation of listings is critical to the success of a real estate licensee, and that there is no cost-effective alternative to communicating truthful, non-deceptive information about the real estate market, the licensee, the licensee's company, and the nature of their services.

Plaintiffs Hosein and Anderson were charged by the Defendant with a disciplinary violation due to Hosein's mailing a flier to an addressee on the cease-and-desist list for Queens County. The flier introduced Hosein to potential clients, and detailed some of the services provided by his company, Coldwell Banker Halmike Realty. The flier concluded with the following sentence, which the Secretary of State deemed to be a solicitation for a listing: "If you have considered selling or buying a home now or in the near future, or simply want to find out what your home is worth in today's market, don't hesitate to call." Hosein and Anderson

pled no contest to the charge of violating section 175.17 by soliciting a listing for the sale of residential property, and entered into a consent order with the Department of State, pursuant to which each paid a $300 fine.

The Plaintiffs commenced this action pursuant to the Constitution and 42 U.S.C. § 1983 in the United States District Court for the Eastern District of New York in February 1999. On cross-motions for summary judgment, the District Court granted the Plaintiffs' motion for summary judgment, concluding that subsection 442-h(3) and the regulations promulgated thereunder were unconstitutional. The District Court applied the test for content-based regulations of speech, *see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000), and deemed the statute underinclusive as to the stated goal of homeowner privacy because it did not proscribe solicitation by other types of solicitors, *see City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). Accordingly, the Court concluded that the remedy did not "reasonably fit" with the problem it sought to address, *see Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and that the State had failed to show that less restrictive, content-neutral solutions were not available.

Discussion

I. Level of First Amendment Protection

One important determinant of the degree of protection afforded by the First Amendment is whether the activity sought to be regulated constitutes commercial or noncommercial speech. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). The "core notion" of commercial speech is that "which does no more than propose a commercial

transaction." *Id.* at 66, 103 S.Ct. 2875 (internal quotation marks omitted). Even a communication combining commercial and noncommercial elements, if it is an advertisement, makes reference to a specific product, and the speaker has an economic motivation for the communication, is properly characterized as commercial speech. *Id.* at 66-67, 103 S.Ct. 2875.

The Plaintiffs acknowledge that their communications include "truthful, non-deceptive information about themselves, the real estate market, the nature of their services, and those of their company." Brief for Appellees at 22. They claim that the regulations prevent them from providing "invaluable information regarding market conditions, financing and refinancing alternatives, and purchase/sale opportunities which would not otherwise come to the attention of area residents, their families, neighbors and friends." *Id.* at 22-23. In making the "common-sense" distinction between commercial and noncommercial speech, *Bolger,* 463 U.S. at 64, 103 S.Ct. 2875, we place this type of speech squarely into the category of commercial speech.

Somewhat side-stepping the commercial speech category, the Plaintiffs contend, in agreement with the District Court, that because the statute and regulation target only real estate solicitations, their constitutionality should be evaluated under the rigorous test applicable to content-based regulations of speech. Although some members of the Supreme Court have questioned whether the *Central Hudson* analysis should be applied in particular commercial speech cases, *see Greater New Orleans Broadcasting Association, Inc. v. United States,* 527 U.S. 173, 184, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) (Stevens, J.); *id.* at 197, 119 S.Ct. 1923 (Thomas, J., concurring in judgment); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 517, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (Scalia, J., concurring in part and in judgment); *Discovery Network,* 507 U.S. at 416 n. 11, 113 S.Ct. 1505

(Stevens, J.), the Court has rejected the argument that strict scrutiny should apply to regulations of commercial speech that are content-specific, adhering instead to the somewhat less rigorous standards of *Central Hudson*. *See Thompson v. Western States Medical Center*, — U.S. —, — - —, 122 S.Ct. 1497, 1503-04, 152 L.Ed.2d 563, — - — (2002) (acknowledging the challenge to the *Central Hudson* analysis, but finding "no need in this case to break new ground"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) (refusing to apply strict scrutiny to tobacco-specific regulations, and finding *Central Hudson* an adequate basis for commercial speech cases); *see also Long Island Board of Realtors, Inc. v. Incorporated Village of Massapequa Park*, 277 F.3d 622, 626 (2d Cir.2002) (rejecting the argument that a municipal ordinance regulating the display of signs should be subject to a heightened level of scrutiny as a content-based regulation).

II. The *Central Hudson* Test

Central Hudson sets forth a four-part framework for considering whether commercial speech may be validly restricted. First, for commercial speech to merit any First Amendment protection, it "must concern lawful activity and not be misleading." Next, the government must assert a substantial interest to be achieved by the restriction. If both these conditions are met, the third and fourth parts of the test are "whether the regulation directly advances the governmental interest asserted" and whether the regulation "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 563-66, 100 S.Ct. 2343.

A. Substantial State Interest

In this case, the Secretary does not dispute the District Court's conclusion that the prohibited solicitations contain speech that is lawful and not misleading. To meet the second

step of the analysis, the Secretary identifies two governmental interests promoted by subsection 442-h(3): (1) the State's interest in protecting neighborhoods from blockbusting, and (2) the State's interest in protecting the privacy of homeowners from harassing in-home real estate solicitations.[5] Because the State's regulatory scheme is sustainable solely on the homeowners' privacy interest, we need not consider the interest in avoiding blockbusting.

The homeowners' privacy interest is "substantial" within the meaning of *Central Hudson.* The Supreme Court has declared that protecting the "well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 625, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995)

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[5] The Plaintiffs complain that the Secretary has belatedly sought to rely on privacy as the asserted state interest, and that privacy is not mentioned in the statute, regulation, or legislative findings. However, the Secretary need not rely on the justifications offered by the State when the statute was enacted, since any insufficiency in the original motivation "does not diminish other interests that the restriction may now serve." *See Bolger,* 463 U.S. at 71, 103 S.Ct. 2875; *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 460, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978); *see also Greater New Orleans Broadcasting,* 527 U.S. at 187, 119 S.Ct. 1923 ("[E]nacted congressional policy and 'governmental interests' are not necessarily equivalents for purposes of commercial speech analysis."). While courts cannot supplant with hypothetical interests the precise interests put forward by the state in defense of its regulation, *see Edenfield v. Fane,* 507 U.S. 761, 768, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), the Supreme Court has repeatedly applied the *Central Hudson* test with reference to the interests asserted by the state in litigation challenging the regulation. *See Western States Medical Center,* — U.S. at —, 122 S.Ct. at 1504; *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 624-25, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 484-85, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995); *see also Western States Medical Center,* — U.S. at —, 122 S.Ct. at 1507 (noting that with respect to an interest described by the dissent, "[n]owhere *in its briefs* . . . does the Government argue that this interest motivated the advertising ban") (emphasis added).

(internal quotation marks omitted); *Frisby v. Schultz,* 487 U.S. 474, 484-85, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (noting, in upholding ban on residential picketing, that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions"); *see also Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton,* — U.S. —, 122 S.Ct. 2080, —, 153 L.Ed.2d 205 (2002) (noting that "residents' privacy" is among "important interests that the Village may seek to safeguard through some form of regulation of solicitation activity."). The Court has observed that "[e]ven solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient. . . . [P]rotection of the public from these aspects of solicitation is a legitimate and important state interest." *Edenfield v. Fane,* 507 U.S. 761, 769, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (internal citations and quotations omitted); *see also Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 462, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). As the District Court noted, the Secretary asserts such a situation here, stating that many homeowners feel "harassed, overwhelmed, threatened, and offended by the extensive telephonic, mail, flyers, and personal direct solicitation they receive." Accordingly, the interest in protecting homeowners from such harassing solicitations is a substantial state interest.

B. "Reasonable Fit"

The third and fourth steps coalesce to require "a reasonable fit between the legislature's ends and the means chosen to accomplish those ends." *Lorillard Tobacco,* 533 U.S. at 556, 121 S.Ct. 2404 (internal quotations marks omitted). The party seeking to uphold a restriction on commercial speech carries the burden of justifying it, and cannot satisfy this burden by "mere speculation or conjecture" but "must demonstrate that the harms it recites are real and that its

restrictions will in fact alleviate them to a material degree." *Edenfield,* 507 U.S. at 770-71, 113 S.Ct. 1792.

The record adequately demonstrates that the harm to homeowners' privacy from real estate solicitations is real, and that the cease-and-desist zones advance that interest directly and to a material degree. The popularity of the program, statements at the public hearings in support of the cease-and-desist zones, and complaints of violations of the registry all support the contention that homeowners feel harassed by the amount and the intensity of the solicitations, and that the cease-and-desist zones have alleviated that harm. Although a prohibition that makes only a minute contribution to the advancement of the state interest is not considered to have advanced the interest "to a material degree," *see Edenfield,* 507 U.S. at 771, 113 S.Ct. 1792; *Bad Frog Brewery, Inc. v. New York State Liquor Authority,* 134 F.3d 87, 100 (2d Cir.1998) ("[A] state must demonstrate that its commercial speech limitation is part of a substantial effort to advance a valid state interest, not merely the removal of a few grains of offensive sand from a beach of vulgarity."), the State's evidence satisfies the "material degree" standard.

As to reasonable fit, the regulation can hardly be accused of being "more extensive than necessary"; it is precisely co-extensive with those who are experiencing the particular harm that it is designed to alleviate. This is the kind of resident-activated restriction that was endorsed by the Supreme Court in *Rowan v. United States Post Office Department,* 397 U.S. 728, 737, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), and more recently in *Playboy,* 529 U.S. at 815, 120 S.Ct. 1878; *see also Watchtower Bible,* 122 S.Ct. at — (observing, as to regulation of activities including religious proselytizing, that provision for posting of "No Solicitation" signs and recognizing right to refuse conversation "provides ample protection for the unwilling listener"). In *Rowan,* the Court reviewed a statute under which a person could require a

mailer of material that he deemed to be "erotically arousing or sexually provocative" to remove his name from its mailing lists and stop all future mailings to the householder. 397 U.S. at 729-30, 90 S.Ct. 1484 (internal quotation marks omitted). The Court rejected the argument that the statute violated the mailers' right to communicate, concluding that such a right could be limited "by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." *Id.* at 737, 90 S.Ct. 1484. In *Playboy,* the Court explicitly endorsed the practice of "targeted blocking," whereby unwanted channels could be blocked on a household-by-household basis. 529 U.S. at 815, 120 S.Ct. 1878. The Court deemed this to be a less restrictive alternative to banning, though still a feasible and effective means of furthering the Government interest in shielding children from sexually-oriented programming. *Id.* In *NYSAR,* this Court, in invalidating a broader prohibition on real estate solicitations, characterized the cease-and-desist registry as a "type of narrower, resident activated measure," that was reasonably tailored, yet still effective. 27 F.3d at 844.

The District Court, however, concluded that because the regulation covered only real estate solicitations, it was not a reasonable fit with the interest in homeowners' privacy. The Court deemed the regulation fatally underinclusive for not proscribing solicitation by other categories of solicitors. However, in the commercial speech context, the Supreme Court has made clear that underinclusiveness will not necessarily defeat a claim that a state interest has been materially advanced, *see Posadas,* 478 U.S. at 342-43, 106 S.Ct. 2968; *Metromedia,* 453 U.S. at 511, 101 S.Ct. 2882. As the Court noted, a state is not required to "make progress on every front before it can make progress on any front." *Edge Broadcasting,* 509 U.S. at 434, 113 S.Ct. 2696.

In *Florida Bar,* for example, where the Florida Bar asserted substantial interests in protecting the privacy of

victims against intrusive contact by lawyers and in protecting the reputation of Florida lawyers, *see* 515 U.S. at 624-25, 115 S.Ct. 2371, the Court upheld the 30-day restriction on direct-mail solicitations of victims despite objections that the privacy invasions and the harm to the reputation of the profession were also consequences of other kinds of attorney advertising and solicitation, *see id.* at 640-41, 115 S.Ct. 2371 (Kennedy, J., dissenting). In concluding that the restriction on "pure commercial advertising" was constitutional, the Court noted that, particularly where the standards and conduct of professionals have traditionally been subject to extensive regulation by the States, "it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the subordinate position of commercial speech in the scale of First Amendment values." *Id.* at 635, 115 S.Ct. 2371 (internal quotation marks and citations omitted). Similarly, in rejecting challenges to a municipal ordinance prohibiting the use of commercial signs on residential property, this Court concluded that the governmental interests in aesthetics and safety were directly advanced by the ordinance, despite arguable objections that the prohibition was underinclusive with respect to those goals. *See Long Island Board of Realtors,* 277 F.3d at 627-28.

Supreme Court decisions that have invalidated commercial speech restrictions for lack of a reasonable "fit" reflect concerns not implicated by the cease-and-desist zones. In *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995), the regulatory scheme was defective by reason of its "overall irrationality," *id.* at 488, 115 S.Ct. 1585, and in *Greater New Orleans Broadcasting,* the scheme was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it," 527 U.S. at 190, 119 S.Ct. 1923. Neither criticism applies to the regulations establishing cease-and-desist zones. In *Discovery Network,* the Court invalidated a ban on newsracks distributing

commercial handbills but not those distributing newspapers because the benefit in safety and aesthetics was "minimal" compared to the total number of newsracks on the public right of way, 507 U.S. at 418, 113 S.Ct. 1505, and because the distinction between commercial and noncommercial speech bore "no relationship *whatsoever*" to the interests asserted, *id.* at 424, 113 S.Ct. 1505. Here, however, the cease-and-desist zones have been identified because of the high volume of citizen complaints about real estate solicitations sent to homes, the restriction applies only to those seeking insulation from such solicitations, and the Plaintiffs' objection relies on the distinction *among* categories of commercial solicitations, not between commercial and noncommercial solicitations.

In distinguishing between real estate solicitation and other kinds of commercial solicitation, the challenged scheme is more analogous to *Metromedia* than to *Discovery Network.* In *Metromedia,* the Court found the distinction between onsite and offsite commercial advertising on the same property justifiable, although the two might be equally distracting and unattractive, because "the city may believe that offsite advertising . . . presents a more acute problem than does onsite advertising." 453 U.S. at 511, 101 S.Ct. 2882; *see also Posadas,* 478 U.S. at 342-43, 106 S.Ct. 2968 (evidence supported distinction between casino gambling and other games of chance); *cf. Pearson v. Edgar,* 153 F.3d 397, 404 (7th Cir.1998) ("The district court found as a fact that the state produced 'no evidence in this case that real estate solicitation harms or threatens to harm residential privacy.'") (quoting *Pearson v. Edgar,* 965 F.Supp. 1104, 1108-09 (N.D.Ill.1997)). New York's system of identifying zones in which real estate solicitations are voluminous and permitting homeowners in these zones to elect not to receive such solicitations at their homes has a reasonable "fit" with the governmental interest in protecting privacy, and the record supports the use of that system in the zones at issue in this case.

To the extent that some commercial speech restrictions are vulnerable out of concerns about paternalism,[6] the challenged restriction entirely avoids such concerns because it applies only where homeowners elect to seek its protection.

Construing the evidence in the light most favorable to the Plaintiffs, we conclude that there is no genuine issue of material fact. The Secretary has produced evidence of harassing residential real estate solicitations, and the only issue raised by the Plaintiffs is whether this record is sufficient to sustain the regulation. We consider the record sufficient, and conclude that on their face subsection 442-h(3) and the regulations promulgated pursuant to that statute do not violate the First Amendment rights of the Plaintiffs.

The statute also does not violate the Equal Protection Clause. "Insofar as the [statute] does not violate the First Amendment, its definitions and distinctions need only be rationally related to legitimate governmental interests." *General Media Communications, Inc. v. Cohen,* 131 F.3d 273, 276 (2d Cir.1997). Where the plaintiffs have failed to show a violation of the First Amendment, strict scrutiny is inapplicable, and the statute is evaluated under rational basis review. *See Fighting Finest, Inc. v. Bratton,* 95 F.3d 224, 231 (2d Cir.1996). As already discussed, the Secretary has shown

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[6] *See, e.g., Western States Medical Center,* — U.S. at —, 122 S.Ct. at 1507 ("We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."); *Coors Brewing,* 514 U.S. at 497, 115 S.Ct. 1585 (Stevens, J., concurring in judgment) ("[T]he Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good."). *But see 44 Liquormart,* 517 U.S. at 517, 116 S.Ct. 1495 (Scalia, J., concurring in part and in judgment) ("[I]t would also be paternalism for us to prevent the people of the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them.").

a legitimate reason for targeting real estate licensees. *See also Posadas,* 478 U.S. at 344 n. 9, 106 S.Ct. 2968 ("If there is a sufficient 'fit' between the legislature's means and ends to satisfy the concerns of the First Amendment, the same 'fit' is surely adequate under the applicable 'rational basis' equal protection analysis.").

Conclusion

Accordingly, the statute on its face and as applied is constitutional, and the regulations promulgated thereunder do not violate the First Amendment rights of the Plaintiffs. The judgment of the District Court is therefore reversed, and the case is remanded with directions to enter judgment for the Secretary.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Filed June 29, 2001]

CV 99-1038 (TCP)

PATRICIA ANDERSON, MICHAEL A. HOSEIN and STEPHEN E. PARKER,

Plaintiffs,

-against-

ALEXANDER F. TREADWELL, as Secretary of State of the State of New York,

Defendant.

JUDGMENT

A Memorandum and Order of Hon. Thomas C. Platt, United States District Judge, having been filed on June 20, 2001, granting the plaintiffs PATRICIA ANDERSON, MICHAEL A. HOSEIN, and STEPHEN E. PARKER'S motion for summary judgment, declaring that NYRPL 442-h(3), as amended, and all regulations with respect thereto, to establish or enforce so-called cease-and-desist zones and restrictions are unconstitutional; and denying defendant ALEXANDER F. TREADWELL, as Secretary of State of the State of New York's cross-motion motion for summary judgment to declare that the cease-and-desist orders so applied, and NYRPL 442-h(3), as amended, are constitutional, it is

ORDERED AND ADJUDGED that NYRPL 442-h(3), as amended is unconstitutional.

Dated:
Central Islip, New York
June 29, 2001

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/ Joseph Di Talia
JOSEPH DI TALIA
Deputy Clerk-In-Charge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

99-CV-1038 (TCP/MLO)

PATRICIA ANDERSON, MICHAEL A. HOSEIN and STEPHEN E. PARKER,

Plaintiffs,

-against-

ALEXANDER F. TREADWELL, as Secretary of State of the State of New York,

Defendant.

MEMORANDUM AND ORDER

PLATT, District Judge,

Plaintiffs Anderson, Hosein, and Parker move for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, seeking a judgment declaring that, on its face, and as applied, Section 442-h(3) of the Real Property Law of the State of New York, as now amended, and all regulations with respect thereto, to establish or enforce so-called cease-and-desist zones and restrictions are unconstitutional and otherwise invalid. Defendant cross-moves for Summary Judgment seeking a judgment declaring that the cease-and-desist orders as applied, and NYRPL 442-h(3) as now amended, are constitutional. Plaintiffs' motion must be and the same hereby is GRANTED. Defendant's motion must be and the same hereby is DENIED.

BACKGROUND

In 1989, the New York State legislature enacted NYRPL 442-h(3) in response to repeated complaints from home-owners about real estate solicitation. This statute created

cease-and-desist zones whereby homeowners located within such a zone could place their names on a state registry precluding realtors from soliciting to any homeowner listed in the state registry. Cease-and-desist zones are content-based prohibitions, which include a ban on truthful and non-misleading statements of a broker's licensee status as well as his willingness to furnish professional services. Plaintiffs are real estate licensees who are subject to cease-and-desist restrictions in certain areas of New York which have been designated as cease-and-desist zones. Plaintiffs Anderson and Hosein have been prosecuted by the defendant for a cease-and-desist violation for sending a flyer to an address included in defendant's cease-and-desist list for Queens County. All parties agree this flyer would be legal in other parts of New York which are not in cease-and-desist zones.

Plaintiff Parker is a new real estate licensee who alleges he has had particular difficulties in developing his business due to the cease-and-desist zones and restrictions. All plaintiffs are affiliated with firms that are or until recently were franchises of national real estate franchise companies, which provide so-called "farming tools" which are customer solicitation materials such as flyers and door hangers. Halmike Realty, the firm with which Plaintiffs Anderson and Hosein are affiliated, alleges it has surrendered its Coldwell Banker franchise because the cease-and-desist restrictions prohibit effective use of the solicitation materials which are customarily used by real estate licensees. Furthermore, plaintiffs allege that the solicitation of listings is critical to the success of a real estate licensee, and there is no cost-effective alternative to communicating truthful, non-deceptive information about the real-estate market, the licensee, the licensee's company, and the nature of their services. Plaintiffs allege these cease-and-desist zones impede their First Amendment rights under the Constitution and brought this action on February 23, 1999.

SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, a court may grant summary judgment if it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party seeking summary judgment bears the burden of demonstrating that no genuine factual dispute exists. *See Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 36 (2d Cir. 1994).

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citation omitted). Instead, the non-moving party must show that a disputed material fact exists in light of the substantive law by offering "concrete evidence from which a reasonable juror could return a verdict in [its] favor." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 114 (2d Cir. 1988) (*quoting Anderson*, 477 U.S. at 256).

DISCUSSION

"Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 809 (2000). In *Playboy*, the Supreme Court held that content-based regulations of speech could only stand if they can meet a strict scrutiny standard, whereby, the statute must be narrowly tailored, and if a less restrictive alterative means is available for the government to achieve its goals, the government must use it. *See id.* at 815.

The Supreme Court in *Playboy* held unconstitutional a statute that required cable operators to scramble channels primarily dedicated to sexually oriented programming, or

limit viewing of such channels to certain times of the day. The Supreme Court held that the less restrictive content-neutral mechanisms of allowing homeowners the ability to block any channel they did not wish to receive could instead be employed to meet the same goals.

In the instant case, the NYRPL 442-h(3) "cease-and-desist" regulations are predicated on the carriers of particular speech, specifically those individuals who solicit properties for sale or for profit, state licensed realtors and non-licensees alike. As such, this statute is not content-neutral. Thus, when furtherance of the statute's proscribed goals can be accomplished through less restrictive means they must be. *See Playboy* at 815.

Defendant contends that the statute advances a substantial governmental interest by protecting homeowners' right to privacy, stating that many homeowners feel "harassed, overwhelmed, threatened, and offended by the extensive telephonic, mail, flyers, and personal direct solicitation they receive." Defendant alleges this statute provides a solution to this purported problem. In support of this position, defendant states that ample documentation is available to support a finding that solicitation by realtors is a major cause of homeowner harassment and the ability to prevent realtors from communicating with homeowners will relieve such alleged harassment.

However, in light of *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York* and *Playboy*, such alleged privacy interests must not be furthered by any chosen regulatory scheme, but rather one whose remedy is "reasonably fit" with the problem it seeks to address. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980) *See also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000). To be a "reasonable fit," a regulatory scheme must not merely make paltry gains in furtherance of a State interest, but must

directly further such interest, and be no more extensive than is necessary in serving the State interest. *See City of Cincinnati v. Discovery Network*, 507 U.S. 441 (1993).

In *City of Cincinnati v. Discovery Network* a regulatory statute was held unconstitutional for it lacked a "reasonable fit" between the city's interest and the means chosen to serve that interest. *See City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). In this case, the Supreme Court found that a statutory ban on the distribution of "commercial handbills" via newsracks did not "reasonably fit" its purported goal of "safety and esthetics." The statute's constitutional failure was the result of its underinclusiveness; that is, the goal of increased "safety and esthetics" was not served by a statute whose scope was too narrow for it failed to address other sources of the alleged "safety and esthetics" problems such as newspaper racks.

Although the city argued that any decrease in the number of newsracks inversely affected safety and esthetics (thus advancing the State interest), the Supreme Court considered such reasoning "an insufficient justification . . . for the discrimination against respondent's use of newsracks are no more harmful than the permitted newsracks." *Id.* at 418. The continuing availability of newsracks for newspapers, where they too are equally hazardous and esthetically displeasing as commercial handbills, rendered the statute underinclusive, for it could not directly advance the interest of "safety and esthetics" in failing to include non-commercial newsracks that affect safety and esthetics in an identical way.

In the instant case, the underinclusive nature of the anti-solicitation statute is unreasonably fit with its alleged interest of homeowner privacy. NYRPL 442(h)3 solely proscribes solicitation by licensed real estate brokers but not other classes of individuals who may use the same medium to transmit different messages. Though privacy may indeed be affected by real estate solicitation, and the interest advanced

by the statute may be compelling, defendant has not made a showing that solicitation by realtors causes greater harm to homeowners' privacy interests than do other forms of commercial speech that broadcast through like media sources.

In short, NYRPL 442-h(3) is underinclusive since it does not proscribe solicitation by other classes of solicitors, e.g., stock brokers, insurance brokers, etc., groups who also solicit homeowners thereby infringing upon their privacy.

In *Board of Trustees of the State Univ. of New York v. Fox*, the Supreme Court stated that it must be shown how a statute is "narrowly tailored to achieve the desired objective." *Board Of Trustees of the State Univ. of New York v. Fox,* 492 U.S. 469, 480 (1989). Accordingly, since other commercial industries could continue to do what realtors are prohibited from doing—soliciting homeowners—it remains unclear how a statute proscribing solicitation by realtors only would accomplish the desired objective of safeguarding homeowner privacy.

"Where a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy* at 816. Safeguarding residential privacy can be attained alternatively by limiting the method of dissemination one chooses rather than the content of the solicitation. Examples of such content-neutral alternatives include the No Telemarketing Sales Call Statewide Registry which applies to all telemarketers. N.Y. Gen. Bus. Law ch. 547 § 399-z (providing homeowners with the opportunity to place their names on a statewide "do-not-call" list that bars all telemarketers from making contact with them). Federal legislation also imposes similar regulations which apply to all speakers regardless of the content of their communication. See Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102. Though these statutes target only telephonic communications, other forms of

solicitous communications can similarly be addressed by content-neutral legislation.

Defendants have failed to show how such alternatives would be ineffective. In fact, such content-neutral approaches would prove more effective in more broadly addressing the privacy concerns without unduly burdening any particular industry based on the content of its speech. Individuals would be able to reject any commercial solicitations by regulating the medium through which the speech arrives at one's door, without regulating the specific content of individual speech.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for Summary Judgment seeking a declaration that NYRPL 442-h(3), as amended, is unconstitutional, must be and the same hereby is GRANTED; defendant's motion seeking a declaration that NYRPL 442-h(3), as amended, is constitutional, must be and the same hereby is DENIED.

SO ORDERED.

/s/ Thomas C. Platt,
THOMAS C. PLATT, U.S.D.J.

Dated: Central Islip, New York
June 20, 2001

(2)

No. 02-639

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In the

Supreme Court of the United States

PATRICIA C. ANDERSON, MICHAEL A. HOSEIN, AND STEPHEN E. PARKER,

Petitioners,

vs.

ALEXANDER F. TREADWELL, AS SECRETARY OF STATE OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE National Association of REALTORS® IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the National Association of Realtors® submits this brief in support of the Petitioners, Patricia Anderson, Michael A. Hosein, and Stephen Parker.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The National Association of Realtors® (NAR) is a non-profit real estate professional association founded in 1908, incorporated in Illinois and maintaining its headquarters in Chicago, Illinois. NAR was created to promote and encourage the highest and best use of land, to protect and promote private ownership of real property, and to promote professional competence among real estate professionals. NAR's membership consists of persons engaged nationwide in all facets of the real estate business, including, but not limited to, brokerage, appraisal, management, and counseling. Consequently, NAR is a leading advocate of the interests of real estate professionals and real property owners throughout the United States.

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[1] The parties have consented to the filing of this brief. The letters of consent are filed with the Clerk of the U.S. Supreme Court herewith. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

In pursuit of these objectives and the betterment of the real estate profession, NAR engages in a wide range of activities, including promotion of equal opportunity in housing, promulgation and enforcement of a Code of Ethics, and providing programs in real estate education, legal compliance, neighborhood revitalization, and cultural diversity. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, some 1,500 local associations of REALTORS®, and approximately 860,000 "REALTOR®"[2] and REALTOR-ASSOCIATE® members.

NAR's interest in this case is driven by its far-reaching significance for NAR's members, since the holding of the court of appeals threatens to restrict or even eliminate the right of real estate professionals to communicate truthfully with the millions of real estate buyers and sellers who are their prospective clients and customers. NAR is equally concerned about the adverse impact the decision below will have on consumers' access to valuable real estate information, which this Court has recognized as "of vital interest . . . , since it may bear on one of the most important decisions (residents) have a right to make: where to live and raise their families." *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 96 (1977).

Successful commercial endeavors depend on the ability to communicate with potential customers and clients to describe and offer goods or services and solicit business. This principle is particularly true in the field of real

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[2] "REALTOR®" is a federally registered collective membership mark used by members of the NATIONAL ASSOCIATION OF REALTORS® to indicate their membership status.

estate. As noted, NAR's members are engaged in all phases of real estate practice, but the majority of NAR members—perhaps upwards of 80%—are engaged in residential brokerage and sales, where regular communications to and solicitation of prospective buyers and sellers of real estate is both commonplace and necessary. Such broker initiated contacts are of considerable importance to developing a client base and the relationships necessary for success. Indeed, active and regular solicitation of potential clients and customers takes on a heightened importance in a brokerage business like real estate, brokers secure clients by providing informative and reliable information about property and assurances of their personal commitment to customer/client service.

For these reasons, NAR has a keen interest in this case, and in this Court's clarification of the applicable constitutional standards governing regulation of truthful, non-misleading communications by real estate professionals with prospective clients and customers.

ARGUMENT

1. The practice of "prospecting" in real estate is well recognized as an invaluable technique of a successful real estate practice. Prospecting consists of real estate professionals initiating "cold-call" communications to residents in particular geographic areas in order to begin to establish relationships that may later lead to use of the services of the agent.[3] "Personal contact by agent" is cited

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[3] For a description of prospecting or "farming" and its importance, especially to new real estate agents, see Patti Broth-

(continued...)

by both buyers and sellers in one very recent study as the third most important factor in choosing a real estate agent, followed only by referrals from friends, neighbors and relatives and use of the agent in a previous transaction.[4]

Another study of "super salespeople" found an "extremely strong" correlation between success in real estate sales and "prospect(ing) and advertis(ing) to generate new business." Michael Abelson, *Understanding Super Salespeople*, a report prepared for the National Association of Realtors® and the Herbert U. Nelson Memorial Fund (1993), 27-28. That study also noted that all of the salespeople surveyed agreed "that they develop and obtain a mailing list," and that the most successful agents "spend more time prospecting and advertising to generate new business." *Id.*, at 50. Although some homeowners, pursuant to laws like that at issue in this case, may object to receiving real estate solicitations, materials distributed by real estate professionals to consumers often provide useful information and services, such as offering market evaluation of property or practical household management tips.[5] Moreover, although prospecting is primarily intended to reach potential sellers of real estate, it also simultaneously allows real estate professionals to communicate with potential *purchasers* of real

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(...continued)
erton, *New Agents Should Build a Foundation With a Farm*, Realty Times, http://realtytimes.com/rtnews/printrtpages/20000724_farm.htm (November 18, 2002).

[4] National Association of Realtors®, 2002 National Association of Realtors® Profile of Home Buyers and Sellers (2002).

[5] *Pearson v. Edgar*, 965 F.Supp. 1104, 1110 (N.D. Ill. 1997), Findings of Fact 22-25, 27-30.

estate, who may have or later develop a need for the services of a real estate professional in connection with a purchase.

The statute at issue here illustrates the disruptive and adverse effects suffered both by real estate professionals and consumers resulting from restrictions on real estate solicitation. As described in the Petition for Certiorari, New York Property Law subsection 442-h(3) permits the New York Secretary of State to designate a cease-and-desist zone where he "determines that *some* owners of residential real estate property . . . are subject to intense and repeated solicitations by real estate brokers . . . to place their property for sale" (emphasis added.) After the Secretary makes such a determination, it is unlawful for real estate brokers or agents to solicit any owner of residential property who has filed with the Secretary a statement expressing the desire not to be solicited. Real estate professionals often avoid solicitation of *any* owners within a cease-and-desist zone, however, and not simply those who have filed a "no solicitation" request with the Secretary of State. They fear risking the penalties for violating subsection 443-h(3) if a solicitation inadvertently reaches an owner who has placed his name on the "do not solicit" list maintained by the Secretary. See *Pearson v. Edgar*, 965 F.Supp. 1104, 1110 (N.D. Ill. 1997).[6] Thus, although a cease-and-desist zone may be

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[6] In particular, note Findings of Fact 69-73 (record citations omitted):

> 69. Therefore, many real estate brokers attempt to protect themselves from prosecution by not soliciting anyone at all in a community with an anti-solicitation list.

(continued...)

established by the Secretary at the initiation of "some" owners, the effect inevitably is to deny *all* owners within the zone the opportunity to receive communications that could be interpreted as real estate solicitations.

Even if real estate professionals elect to solicit homeowners within a cease-and desist zone who have not filed with the Secretary of State, residents of dwellings owned by owners who have filed still will be denied the opportunity to receive truthful, non-misleading information from real estate professionals. This is because residential property is defined in regulations promulgated pursuant to subsection 443-h(3) as one-, two- or three-family houses, including co-ops or condos, and real estate professionals must avoid solicitation of anyone at those addresses. N.Y. Comp. Code R. & Regs., tit 19, §175.17(d)(1)(i),(e).

(...continued)

70. This deterrent effect prevents brokers from communicating with residents who might be interested in receiving information regarding either their services or other community activities.

71. The fear of prosecution also forces the plaintiffs and other brokers not to advertise in communities with anti-solicitation lists thereby restricting access to information regarding the housing market.

72. Many individuals would benefit from such information since the purchase or sale of a home is often the biggest financial decision that many individuals will make in their lifetimes.

73. The statute also inhibits individuals from receiving information pertinent to their decisions on where to live and raise their families.

For these reasons, the statute here, and the Illinois statute declared unconstitutional in *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998) and similar laws, see *infra* note 8, do *not* simply prevent real estate professionals from soliciting individual residents who have indicated a desire not to receive such communications. Other homeowners who do not object to receiving truthful, non-misleading communications from real estate professionals, and who in fact who may have a particular interest in receiving such information, will be denied the opportunity to receive it.

2. As the Petition for Certiorari correctly explains, the decision of the Second Circuit in this case directly conflicts with the Seventh Circuit's decision in *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998). The conflict between these two decisions is, however, more than an intramural disagreement between two Circuits regarding the First Amendment principles governing restrictions on certain real estate brokerage practices. The decision below creates uncertainty, confusion and conflict regarding a legal issue of considerable importance to the real estate profession that was previously understood by the industry, and presumably by most legislative bodies who regulate the industry, to have been well-settled by *Pearson*.

Pearson was the culmination of over a decade of litigation over the constitutionality of a resident-activated real estate solicitation prohibition.[7] For real estate professionals, though, *Pearson* was not simply about that Illinois statute. In addition to the Illinois statute, a number of suburban Chicago municipalities had enacted

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[7] The complete history of the *Pearson* litigation is set forth in the Petition, note 8.

similar ordinances imposing resident-activated real estate solicitation prohibitions. The ordinances of five of those municipalities were challenged in *South-Suburban Housing Center v. Greater South Suburban Board of Realtors®*, 935 F.2d 868 (7th Cir. 1991), and the Seventh Circuit *sustained* the constitutionality of those ordinances. *Id.*, 935 F.2d at 886-93.

To reach that result the Seventh Circuit relied on *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988), a decision issued in the course of the litigation that concluded with the *Pearson* decision. The basis for the conclusion in *Curtis*, and thus that in *South-Suburban Housing Center*, was that the "reasonable fit" test of the First Amendment criteria applicable to commercial speech under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), is satisfied where a restriction is simply not overinclusive. *Id.*, at 892. That is, for a restriction on commercial speech to pass constitutional muster, it is sufficient if it does not preclude more speech than is necessary to serve the intended governmental interests. Both *Curtis* and *South-Suburban Housing Center* held that because resident-activated prohibitions on real estate solicitation operate to protect the privacy of the very persons offended by real estate solicitations, that is, those persons who had placed their names on the "do not solicit" list, those restrictions were not overinclusive, and thus constitutional. Both courts also asserted that underinclusiveness is not a constitutional defect under *Central Hudson*. (*Curtis*: "Mere underinclusiveness does not, however, amount to constitutional infirmity. . . . [a] restriction on commercial speech may well be valid where it 'directly advances the governmental interest asserted, and . . . is not more *extensive* than is necessary to serve that interest.' *Central Hudson*,

....", 840 F.2d at 1303; *South-Suburban Housing Center*: "[a]s in Curtis, the 'underinclusiveness' of the ordinance fails to prevent it from advancing the government's interest in protecting residential privacy." 935 F.2d at 892.)

Pearson overturned the analysis in *Curtis* and *South-Suburban Housing Center*, firmly grounding its holding on this Court's decision in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) ("*Discovery Network* has changed the law of commercial speech on which [*Curtis* and *South-Suburban Housing Center*] were built." *Pearson*, 153 F.3d at 405.) *Pearson* established that the underinclusiveness of a resident-activated prohibition on real estate solicitation is as constitutionally fatal as over-inclusiveness. ("Here, the homeowner cannot ban any bothersome solicitation but only real estate solicitation. The distinction between real estate solicitation and other kinds of solicitation is a by-product of the statute's original purpose of preventing blockbusting and cannot, we think, satisfy the *Discovery Network* requirement of a 'fit' between [the state's] goals and [the state's] chosen means." *Pearson*, 153 F.3d at 404 (citations omitted).)

Pearson therefore brought certainty and clarity to the constitutional principles applicable to laws imposing resident-activated real estate solicitation prohibitions. In reliance on *Pearson*, real estate professionals and Realtor® associations subsequently challenged the constitutionality of a number of the solicitation restrictions in effect in suburban Chicago, including several of those previously upheld in *South-Suburban Housing Center*. Largely on the strength of the underinclusiveness analysis of *Pearson* and *Discovery Network*, those ordinances

were consistently declared unconstitutional or rescinded.[8] Undoubtedly other state or local governments that may have considered enacting similar real estate solicitation prohibitions did not do so because of the holding of *Pearson*.

Unfortunately for real estate professionals, the Second Circuit opinion below now reintroduces profound uncertainty regarding the constitutionality of prohibitions on

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[8] The South/Southwest Association of Realtors® challenged the resident-activated real estate solicitation prohibition ordinances in the suburban Chicago communities of Blue Island, Calumet City, Chicago Heights, Dolton, Glenwood, Hazel Crest, Matteson, Olympia Fields, Park Forest, Richton Park, Riverdale, South Holland and Lynwood. Most rescinded their ordinances under pressure from the Association and on the basis of *Pearson*, although in three instances the municipality resisted and the Association filed suit asserting *Pearson* as the basis to declare the ordinances unconstitutional. In each case the litigation was quickly resolved in favor of the Association with an adjudicated or agreed declaration that the ordinance was unconstitutional. *South / Southwest Association of Realtors® v. Dolton*, No. 99C3958 (N.D. Ill. Dec. 22, 1999), *South / Southwest Association of Realtors® v. Glenwood*, No. 99C7141 (N.D. Ill. Jan. 28, 2000), *South / Southwest Association of Realtors® v. Olympia Fields*, No. 98C 0174 (N.D. Ill. Apr. 6, 1999). Private communication with Philip C. Stahl, Grippo and Elden, counsel to the South/Southwest Association of Realtors®.

Not to be deterred any more than required, the Village of South Holland subsequently established a "Voluntary Non-Solicitation List," although it claims that "[T]he [*Pearson*] ruling (is) not applicable to local non-solicitation ordinances such as ours." http://www.southholland.org/nonlist/nonlist.htm.

real estate communications. This disharmony is made all the more troubling by the fact that the Second Circuit reached its conclusion based on precisely the same principle underlying the now superceded holdings in *Curtis* and *South-Suburban Housing Center*: that underinclusiveness is not a constitutional defect, and the absence of overinclusiveness is adequate to sustain the statute under *Central Hudson* ("New York's system of identifying zones in which real estate solicitations are voluminous and permitting homeowners in these zones to elect not to receive such solicitations at their homes has a reasonable 'fit' with the governmental interest in protecting privacy, ..." *Anderson v. Treadwell*, 294 F.3d 453, 464 (2nd Cir. 2002).)

Thus, prior to the decision below, real estate professionals in the Seventh Circuit and elsewhere relied on *Pearson*, and it's plain overruling of the contrary conclusions of *Curtis* and *South-Suburban Housing Center*, to challenge existing real estate solicitation ordinances and to oppose adoption of new ones. Real estate professionals and Realtor® associations were generally spared the burden and expense of initiating and pursuing litigation to enforce *Pearson's* holding that a resident-activated real estate solicitation prohibition is unconstitutional.

The Second Circuit thus not only reversed the district court ruling as to the New York Property Law, it resurrected the heretofore discredited interpretation of the *Central Hudson* "reasonable fit" test articulated in *Curtis* and *South-Suburban Housing Center*. It revived the previously well-settled question of whether such laws are constitutional. The ruling below further produces the incongruous and untenable result that whether real estate professionals can be denied the right to send

truthful, non-deceptive communications to prospective clients and customers may depend on the jurisdiction in which they practice their profession. For this reason, this Court should grant review to resolve this now unsettled issue and restore clarity to this important and recurring question.

3. Notwithstanding the holding in *Pearson* that resident-activated real estate solicitation prohibitions violate the First Amendment rights of real estate professionals, ordinances imposing such restrictions persist. Unless this Court grants review, courts faced with challenges to such restrictions now will be forced to choose between following the Second Circuit's holding or that of *Pearson*.

For example, the Fair Neighborhood Practices ordinance in effect in Southfield, Michigan, provides that

> It shall be unlawful for any person, firm, partnership, association or corporation which engages in the sale and/or listing of residential property for profit or commercial gain to solicit the sale or listing for sale for any purpose relating to the sale of any residential property, either by telephone, through the mail, in person or by any other method after the owner of such property has indicated through written notice a desire not to be solicited in accordance with the procedure outlined in this section.

City of Southfield (MI) Code, Ch. 122, Sec. 9.383(a).[9] The ordinance also contains provisions describing how residential property owners can file with the city a re-

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[9] http://livepublish.municode.com/13/lpext.dll/infobase 22/1/21af/25e4?f+templates&fn. . . .

quest not to be solicited. Section 9.386 provides that a violation of the ordinance is a misdemeanor that may be punished by a fine of up to $500 and 90 days imprisonment.

Similarly, section K of chapter 13, Article 2, subsection 1 of the Village Code of Oak Park, Illinois, entitled Unlawful Real Estate Practices, provides that it is unlawful

> For any person to solicit any property for sale or rental or the listing of any property for sale or rental at any time notice has been given that any owner or tenant of such real estate does not desire to sell or lease such real estate or does not desire to be solicited.

Oak Park (IL) Village Code Chapter 13, Article 2, section 2-1.[10] An owner or tenant who desires not to be solicited may give notice to the Village Clerk, who maintains for inspection a list of persons who have given such notice. The Clerk also must furnish a copy of that list to every real estate broker in the Village.

These ordinances are merely examples of why this Court should articulate clearly the applicable First Amendment principles. *Pearson* controls the result in a challenge to the Oak Park, Illinois ordinance. By contrast, a Michigan court addressing the Southfield ordinance would not be bound by *Pearson*, and would be free to apply the reasoning of the decision below to declare the ordinance constitutional. Other courts outside the Second or Seventh Circuits will be compelled to attempt to predict how this Court would reconcile the conflict between them.

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[10] http://www.sterlingcodifiers.com/IL/Oak%20Park/.

Moreover, the decision of the Second Circuit is likely to entice communities outside the Seventh Circuit to adopt resident-activated prohibitions or restrictions on real estate solicitations, *Pearson* notwithstanding. The very existence of Subsection 443-h(3) of New York Property law, at issue here, and the myriad of laws in Illinois declared unconstitutional in, and pursuant to, *Pearson*, illustrates the considerable legislative interest in adopting content-based resident-activated real estate communication restrictions. The decision below thus encourages and emboldens states and municipalities outside the Seventh Circuit to enact real estate solicitation prohibitions, with their attendant harm to significant First Amendment freedoms. NAR therefore urges this Court to grant the Petition for Certiorari to resolve the conflict between the holding below and *Pearson*, and to eliminate the uncertainty and controversy over the extent to which real estate solicitation is protected by the Constitution.

CONCLUSION

For the reasons set forth above, NAR respectfully urges this Court to grant the Petition for Certiorari.

DATED: November 21, 2002

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No. 02-639

IN THE

Supreme Court of the United States

PATRICIA C. ANDERSON, MICHAEL A. HOSEIN, and STEPHEN E. PARKER,

Petitioners,

v.

ALEXANDER F. TREADWELL, as Secretary of State of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that the standard of intermediate scrutiny set forth in *Central Hudson* applies in assessing a First Amendment challenge to a New York regulatory scheme that protects residential privacy and prevents "blockbusting" by allowing homeowners in specified areas of the State to elect not to receive in-home real estate solicitations?

2. Whether the Second Circuit's application of the *Central Hudson* test was inconsistent with the decisions of this Court or of the other Courts of Appeal?

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STATEMENT OF THE CASE

Petitioners Patricia C. Anderson, Michael A. Hosein, and Stephen E. Parker, real estate professionals licensed by the New York Department of State, seek this Court's review of a decision of the United States Court of Appeals for the Second Circuit that rejected petitioners' First Amendment challenge to New York Real Property Law § 442-h(3) and its implementing regulations. Section 442-h(3) authorizes respondent the Secretary of State of the State of New York, upon finding that owners of residential property within a defined geographic zone have been subject to "intense and repeated solicitation" by real estate professionals, to establish "cease and desist zones" through the promulgation of a regulation. Owners of residential property within a cease and desist zone may inform the Secretary of State that they do not wish to receive real estate solicitations.

The Secretary of State compiles a list of residents within each cease and desist zone who have affirmatively elected to avail themselves of the statute's protection. Real estate professionals are prohibited from directly soliciting residents on the list by mail, by telephone, or in person. N.Y. Real Prop. L. § 442-h(3)(a); N.Y. Comp. Codes R. & Regs. tit. 19, § 175.17(c)(1), (d)(1). The ban on solicitations does not include classified advertisements in periodicals that are not primarily real-estate related, advertisements placed in public view, or radio and television advertisements. *Id.* § 175.17(d)(2). A rule establishing a cease and desist zone is effective for five years, after which it may be re-adopted by the Secretary of State or it will expire. N.Y. Real Prop. L. § 442-h(3)(c). The areas that are currently designated as cease and desist zones comprise certain neighborhoods in Bronx,

Nassau, and Kings Counties, and all of Queens County. The locations of these zones are specified at N.Y. Comp. Codes R. & Regs. tit. 19, § 175.17(c)(2).

A. Background.

New York Human Rights Law § 296(3-b), enacted in 1969, outlaws "blockbusting" — the practice of soliciting real estate sales and listings by representing that a change in the racial, ethnic, or religious character of a block, neighborhood, or area has occurred, or will or may occur. N.Y. Exec. Law § 296(3-b). The State has found that it is difficult to prosecute blockbusting directly. Blockbusting statements tend to be oral, raising difficult issues of proof. In addition, the statements may contain suggestions to sell before it is "too late" or innuendoes about "the neighborhood changing," without directly mentioning the race, ethnicity, or religion of newcomers.

In 1989, the Legislature concluded that this ban was inadequate to prevent blockbusting and, in order to aid enforcement efforts, enacted Real Property Law § 442-h. In explaining why additional legislation was necessary, the Legislature stated:

> The legislature finds that, from time to time, homeowners in some neighborhoods in the state of New York have been subjected to intense and repeated solicitation by real estate brokers and salespersons to place their homes for sale with such brokers and salespersons with the implication that property values will be decreasing because persons of different ethnic, social or religious background are moving or are about to move into

> the neighborhood in greater numbers. This type of solicitation technique constitutes a churning of the market and generates panic selling in the neighborhood. In such a charged atmosphere, mention of the ethnic, social or religious background of the prospective buyer becomes unnecessary.

1989 N.Y. Laws, ch. 696, § 1.

Section 442-h sets forth two alternative ways in which the Secretary of State may act. First, § 442-h(2) permits the Secretary of State, upon finding after public hearing and investigation that a defined geographic area is subject to blockbusting, to issue a "nonsolicitation order" (promulgated as a regulation) forbidding real estate professionals (*i.e.*, real estate brokers, salespersons, or other persons regularly engaged in the trade or business of buying or selling real estate) from soliciting real estate listings or sales from all homeowners in the area. Such an order may prohibit any or all types of solicitation directed to particular homeowners. Second, § 442-h(3), the provision at issue in this case, authorizes the Secretary of State, upon finding that a defined geographic area has been subjected to "intense and repeated" real estate solicitation, to establish a "cease and desist zone" within which real estate professionals are prohibited from directing in-home solicitations only to those homeowners who have indicated to the Secretary of State that they do not wish to receive such solicitations.

In 1991, the Second Circuit held that a nonsolicitation order issued by the Secretary of State pursuant to § 442-h(2) violated the First Amendment. *New York State Ass'n of*

Realtors v. Shaffer, 27 F.3d 834 (2d Cir. 1994).[1] Applying *Central Hudson*'s test for analyzing restrictions on commercial speech, the Second Circuit concluded that although the State had provided some evidence that the areas covered by the non-solicitation order had been subjected to blockbusting, that evidence did not suffice to justify a blanket prohibition on all solicitation of homeowners in those areas. *Id.* at 843-44. The court explained that the State had failed to demonstrate that less restrictive means, such as the cease and desist orders authorized by § 442-h(3), would not have been effective in combatting the demonstrated level of blockbusting. *Id.* at 844; *see also* App. 13a ("In *NYSAR*, this Court, in invalidating a broader prohibition on real estate solicitations, characterized the cease-and-desist registry as a 'type of narrower, resident activated measure,' that was reasonably tailored, yet still effective."). There are currently no § 442-h(2) nonsolicitation orders in effect in New York.

The Secretary of State has instead designated five "opt-in" cease and desist zones under § 442-h(3). Most of the current cease and desist zones were first designated in

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1. Petitioners' claim that "the Second Circuit held that subsection 442-h(2) violates the First Amendment" (Cert. Pet. at 6 n.1) is incorrect. Rather, the court stated:

> [W]e believe that the Realtors' position on this appeal . . . is in reality a facial challenge to the specific nonsolicitation regulation promulgated under the statute, rather than a facial attack on the statute itself. Accordingly, we confine our First Amendment inquiry to the narrow issue of whether the challenged regulations promulgated by the Secretary pursuant to statutory authority, particularly the nonsolicitation regulation, are valid governmental restrictions on speech.

27 F.3d at 839.

1994 after public hearings and, because a regulation establishing a cease and desist zone is valid for only five years, have since been re-designated.

During periods of public comment preceding the most recent re-designations, the Secretary received hundreds of informal complaints and petitions from individual citizens. The record developed during that comment period is replete with complaints about explicit and implicit blockbusting tactics. For example, there were reports of explicit racial appeals, such as "the neighborhood is getting black" and references to "minorities" moving in. Homeowners also reported references by real estate professionals to "cultural changes in the community," declining property values, and new neighbors with names like "Sanchez, Gonzales, [and] Diallo." The record also documents numerous complaints about the intrusive and harassing nature of in-home real estate solicitations, by mail, telephone, and in person. Homeowners reported that they had been "inundated," "bombarded," "bothered," "hounded," and "deluged" by real estate solicitations in their homes. In a petition urging the Secretary to maintain cease and desist zones in their community, more than 250 residents described the zones as their "only defense" against "unscrupulous real estate brokers." Approximately 20,000 homeowners residing within the cease and desist zones have asked to be placed on the registry maintained by the Department of State. More than 800 homeowners have lodged formal complaints of violations of the cease and desist registry since 1997.

B. The Proceedings Below.

Petitioners filed suit in the United States District Court for the Eastern District of New York. They sought a judgment declaring that § 442-h(3), on its face, and as applied, as well

as the regulations promulgated pursuant thereto, violate their rights under the First Amendment. The district court granted petitioners' motion for summary judgment, and denied respondent's cross-motion for summary judgment, holding that § 442-h(3) and its implementing regulations are unconstitutional. App. 18a-19a, 26a.

Relying on *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the district court concluded that § 442-h(3) was a "content-based" restriction on speech and therefore subject to strict scrutiny. App. 22a-23a. Insofar as it was designed to protect residential privacy, the district court found the challenged provision underinclusive, "since it does not proscribe solicitation by other classes of solicitors." App. 25a. The court further found that the statute did not "reasonably fit" the problem it sought to remedy because the court believed that other types of "content-neutral" restrictions could better protect the state's interest in protecting residential privacy. App. 25a-26a. The district court failed to even mention, let alone analyze, respondent's argument that the statute is justified based on the State's interest in preventing blockbusting.

On appeal, the Second Circuit reversed. Turning first to the question of what level of scrutiny should be applied, the court concluded that the type of speech regulated by § 442-h(3) belonged "squarely in[] the category of commercial speech." App. 8a. While acknowledging that some Justices have questioned the appropriateness of *Central Hudson* for certain categories of commercial speech cases, the Second Circuit noted that this Court has continued to apply *Central Hudson*'s intermediate scrutiny standard, rather than strict scrutiny, in evaluating challenges to content-specific regulations of commercial speech. App. 8a-9a

(citing *Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497, 1503-04 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001)).

The Second Circuit then proceeded to apply the *Central Hudson* test. Examining whether the government had advanced a substantial state interest in support of § 442-h(3), the court observed that the State had identified two interests served by the provision: "(1) the State's interest in protecting neighborhoods from blockbusting, and (2) the State's interest in protecting the privacy of homeowners from harassing in-home real estate solicitations." App. 10a. Relying on numerous precedents of this Court, as well as on the State's assertion that many homeowners feel "harassed, overwhelmed, threatened, and offended by the extensive telephonic, mail, flyers, and personal direct solicitation they receive," the Second Circuit concluded that the State's interest in protecting homeowners from harassing solicitations is substantial — a point which petitioners do not dispute. *See* Cert. Pet. at 17. The court stated that "[b]ecause the State's regulatory scheme is sustainable solely on the homeowners' privacy interest, we need not consider the interest in avoiding blockbusting." App. 10a.[2]

Next, the Second Circuit examined the third and fourth steps of the *Central Hudson* test, *i.e.*, whether the regulation directly advances the State's interest, and whether there is "a reasonable fit between the legislature's ends and the means

2. In *New York State Ass'n of Realtors v. Shaffer*, the Second Circuit had held that "the governmental interest in the promotion of stable, racially integrated communities through the elimination of the pernicious practice of blockbusting is a 'vital goal.'" 27 F.3d at 841 (quoting *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 94-95 (1977)).

chosen to accomplish those ends." App. 11a. The cou
emphasized that the State's burden could not be satisfied b
"mere speculation or conjecture," but rather that it mu
demonstrate that "the harms it recites are real" and that th
restrictions at issue "will in fact alleviate them to a materi
degree." App. 11a-12a.

The court found that the asserted harm to homeowner
residential privacy from real estate solicitations was inde
real, and that the cease and desist zones directly a
materially advance the State's interest in alleviating th
harm. In support of this conclusion, the court pointed
evidence of the popularity of the program, statements
public hearings in support of the cease and desist zones, a
complaints regarding solicitation of homeowners who h
placed their names on the cease and desist lists. App. 12a

Turning to the issue of "reasonable fit," the Secc
Circuit found that the regulation could not be faulted for be
more extensive than necessary, because "it is precis
co-extensive with those who are experiencing the particu
harm that it is designed to alleviate." *Id.* The court obser
that this type of "resident-activated restriction" has b
endorsed by this Court in such cases as *Rowan v. Uni*
States Post Office Department, 397 U.S. 728, 737 (19
and *Playboy*, 529 U.S. at 815, as a less restrictive alterna
to an outright ban on the speech in question.

In rejecting the district court's contrary conclusion
§ 442-h(3) is fatally underinclusive, because it applies
to real estate solicitations, the Second Circuit noted that u
this Court's decisions, the underinclusiveness
commercial speech restriction does not necessarily de
the contention that the restriction materially advances a

interest. App. 13a-14a. The Second Circuit also distinguished numerous cases, including *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), in which this Court has invalidated commercial speech restrictions for lack of a reasonable fit. App. 14a-15a. It further indicated that its decision did not conflict with the Seventh Circuit's ruling in *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998), which involved a broader restriction on real estate solicitations. It noted that in contrast to this case, the Seventh Circuit relied on a factual finding that the state had failed to produce evidence of any actual harm to residential privacy from real estate solicitation.

Finally, the Second Circuit explained that insofar as some restrictions on commercial speech may be vulnerable to challenge as being paternalistic, the cease and desist provisions avoid that concern because they apply only where homeowners choose to take advantage of their protection. App. 16a (citing *Western States Med. Ctr.*, 122 S. Ct. at 1507, and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring in judgment)).

The Second Circuit did not address respondent's argument that the constitutionality of § 442-h(3) could also be supported by the State's interest in preventing blockbusting.

REASONS FOR DENYING THE PETITION

Petitioners have failed to identify any grounds warranting a grant of certiorari in this case. They first assert that the Court should hear the case in order to revisit whether *Central Hudson*'s intermediate scrutiny standard should apply to regulation of truthful, non-misleading commercial speech that is not intended to prevent commercial harms or protect a fair bargaining process. This case, however, presents none of the factors that have led some members of the Court to

question whether certain types of commercial speech restrictions should be subject to greater scrutiny than is mandated by *Central Hudson*. It therefore would not afford the Court a meaningful opportunity for resolving those concerns.

Nor does the Second Circuit's application of *Central Hudson* conflict with any decisions of this Court or the other Courts of Appeals. The decision below fully comports with relevant commercial speech precedents and is plainly distinguishable on the facts from the Seventh Circuit's decision regarding an anti-blockbusting statute in *Pearson v. Edgar*. Petitioners' arguments to the contrary are nothing more than a request for error correction by this Court.

In any event, this case would provide a poor vehicle for any further refinement of the *Central Hudson* framework. Neither of the courts below addressed the State's interest in preventing blockbusting. Resolution of petitioners' claim — and even of whether § 442-h(3) was appropriately subject to intermediate scrutiny as a regulation intended to prevent commercial harm and protect the bargaining process — would require this Court to evaluate the anti-blockbusting interest asserted by the State without the aid of any analysis by the lower courts. Accordingly, the petition for a writ of certiorari should be denied.

I. THE PRESENT CASE DOES NOT PROVIDE OCCASION FOR THIS COURT TO REVISIT THE APPLICABILITY OF *CENTRAL HUDSON*'S INTERMEDIATE SCRUTINY STANDARD.

For more than 20 years, this Court has consistently applied the intermediate scrutiny called for in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), in assessing First Amendment challenges to regulations of commercial speech, including in cases directly analogous to this one.[3] Although several members of the Court have expressed concerns about the applicability of this standard, the factors that motivated these reservations are wholly absent here. Finally, petitioners' contention that strict scrutiny is appropriate in the present case is predicated on their assertion that § 442-h(3), insofar as it is designed to protect residential privacy, is not aimed at preventing

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3. Petitioners contend that "[i]n disagreement with the Seoncd Circuit, other lower courts have applied strict scrutiny to content-based commercial speech restrictions." Cert. Pet. at 13 n.6. But in *MD II Entertainment v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994), the Fifth Circuit applied intermediate scrutiny in invalidating the challenged restriction: "Because we conclude that, on the record before us, § 14-1(5)(B) does not survive the intermediate scrutiny of *Central Hudson*, we need not consider whether that test, rather than the strict scrutiny of [*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)], must guide our inquiry." *Id.* at 495. In *Citizens United for Free Speech II v. Long Beach Township Board of Commissioners*, 802 F. Supp. 1223 (D.N.J. 1992), the district court, relying on *R.A.V.*, held that content-based restrictions on commercial speech are subject to strict scrutiny. That decision's interpretation of *R.A.V.* simply cannot be reconciled with this Court's subsequent commercial speech jurisprudence. *See, e.g.*, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 622-24 (1995).

commercial harm or protecting the bargaining process. But this Court has consistently held that restrictions on solicitation designed to protect residential or consumer privacy are in fact subject to intermediate scrutiny.

A. This Court Has Applied *Central Hudson*'s Intermediate Scrutiny Standard in Analogous Cases Involving Solicitation by Professionals

The regulation challenged in the present case — which permits homeowners, in geographic areas that the Secretary of State has found to have been subjected to "intense and repeated solicitation" by real estate professionals, to affirmatively elect not to receive in-home real estate solicitations — falls squarely within the range of restrictions of commercial speech as to which the Court has repeatedly held that intermediate scrutiny is appropriate. *See Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002) ("Although commercial speech is protected by the First Amendment, not all regulation of such speech is unconstitutional. In *Central Hudson*, *supra*, we articulated a test for determining whether a particular commercial speech regulation is constitutionally permissible.").[4]

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4. Petitioners' assertion that "a majority of this Court has concluded that *Central Hudson* does not state the appropriate test for content-based restrictions on non-deceptive commercial speech" (Cert. Pet. at 13) is contradicted by *Western States Medical Center*, the Court's most recent commercial speech decision. The Court, while acknowledging that several Justices have expressed doubts about the *Central Hudson* analysis and its applicability in particular cases, nonetheless stated: "'*Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.'" (Cont'd)

As the Second Circuit observed, this Court has applied *Central Hudson* in evaluating restrictions on solicitations by professionals that are directly analogous to those challenged here. This Court has held that solicitation by professionals such as attorneys or accountants is core commercial speech, and has made clear that protection of the privacy of residents and consumers from unwanted solicitations is a proper motivation for the regulation of such speech. These cases reference none of the reservations about *Central Hudson* to which petitioners point in seeking certiorari.

For example, in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the Court considered whether rules of the Florida Bar which prohibited personal injury lawyers from sending targeted direct-mail solicitations to accident victims and their relatives for 30 days following an accident violated the First Amendment. The Florida Bar contended that the restriction was supported by its interest in "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers," which related to the Bar's concern with maintaining the reputation of the legal reputation in the eyes of the public. *Id.* at 624. After observing that the solicitations in question clearly constituted commercial speech, the Court explained: "we engage in 'intermediate' scrutiny of restrictions on commercial speech, analyzing them under the framework

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(Cont'd)

Western States Med. Ctr., 122 S. Ct. at 1504 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001) (quoting *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999))). In *Western States Medical Center*, the restriction in question undeniably was content-based and there was no contention that the prohibited speech was misleading. *Id.*

set forth in [*Central Hudson*]." *Id.* at 623. The dissent agreed with the majority that *Central Hudson* provided the appropriate framework for analyzing the restriction. *Id.* at 636 (Kennedy, J., dissenting).

Likewise, in *Edenfield v. Fane*, 507 U.S. 761, 767 (1993), the Court, in considering the constitutionality of a Florida Board of Accountancy rule prohibiting direct, in-person, uninvited solicitations by certified public accountants, applied *Central Hudson*'s intermediate standard of review to the challenged restriction. In supporting the constitutionality of the ban on solicitation, the Board had relied upon the state's interest in protecting consumers from fraud and intrusions on privacy, and on the state's interest in preserving the fact and appearance of CPA independence in performing audits. *Id.* at 768.

B. None of the Factors That Have Led Some Members of This Court to Question the Applicability of Strict Scrutiny are Present Here

To be sure, as petitioners point out, several Justices have questioned whether certain types of commercial speech regulations should be subjected to greater scrutiny than is called for by *Central Hudson*. Section 442-h(3), however, does not implicate these concerns, and thus it does not provide a useful vehicle for resolving any such doubts about *Central Hudson*.

First, insofar as some Justices have expressed concern about commercial speech restrictions motivated by paternalism or the desire to keep would-be recipients "in the dark," *see, e.g.*, *Western States Med. Ctr.*, 122 S. Ct. at 1507;

id. at 1509 (Thomas, J., concurring); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999); *Rubin v. Coors Brewing*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring in judgment), § 442-h(3) avoids that concern by prohibiting only solicitations directed to homeowners who have informed the Secretary of State that they do not wish to receive them.

Moreover, the challenged regulation does not impose a blanket ban on commercial speech, which some Justices have identified as possibly warranting greater scrutiny. As petitioners point out, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996), Justice Stevens, joined by Justices Kennedy and Ginsburg, suggested that a stricter level of scrutiny may be appropriate "when a State entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process." Section 442-h(3), however, does not fit this description. New York does not "entirely prohibit[] the dissemination" of the commercial speech in question. Rather, § 442-h(3) prohibits in-home solicitations only of homeowners who have indicated to the Secretary of State that they do not wish to receive such solicitations. Moreover, the implementing regulation explicitly excludes from its ban any classified advertisements in periodicals that are not primarily real-estate related, advertisements placed in public view, and radio and television advertisements. N.Y. Comp. Codes R. & Regs. tit. 19, § 175.17(d)(2). *Cf. 44 Liquormart*, 517 U.S. at 502 (in *Florida Bar*, "we upheld a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers").

Finally petitioners contend that insofar as § 442-h(3) is justified by the State's interest in protecting residents' privacy,

it does not address commercial harms or protect the bargaining process, and therefore should be subjected to strict scrutiny. This Court's decisions in cases involving professional solicitation do not support petitioners' view that protecting residential privacy is an insufficient justification for a commercial speech regulation. Rather, this Court has consistently recognized that protecting residential and consumer privacy is an appropriate "substantial state interest" for purposes of justifying a commercial speech regulation under *Central Hudson*. As the Court explained in *Edenfield*: "[T]he protection of potential clients' privacy is a substantial state interest. Even solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient." 507 U.S. at 769; *see also Florida Bar*, 515 U.S. at 625 ("'the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society'" (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980))); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1977) (recognizing "legitimate and important state interest" in protecting public from "those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'").

II. THE SECOND CIRCUIT'S APPLICATION OF *CENTRAL HUDSON* DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR THE OTHER COURTS OF APPEALS.

Petitioners erroneously contend that the Second Circuit's decision conflicts with this Court's decisions and with the Seventh Circuit's decision in *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998). To the contrary, the Second Circuit's application of *Central Hudson* was straightforward and fully

consistent with this Court's commercial speech precedents, and the Seventh Circuit's decision is plainly distinguishable on its facts.

Central Hudson includes four steps for determining the constitutionality of a commercial speech restriction:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Lorillard, 533 U.S. at 554 (quoting *Central Hudson*, 447 U.S. at 566).

Petitioners claim to have identified two ways in which the Second Circuit's application of this test allegedly departed from the relevant precedent. First, relying on *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), and the Seventh Circuit's decision in *Pearson*, they allege that the Second Circuit should have held that § 442-h(3) is underinclusive in that it does not bar all in-home solicitations that might intrude on residential privacy, and therefore that it fails to satisfy the third and fourth elements of the test. Second, pointing to several Supreme Court decisions invalidating resident-activated measures, they contend that the Second Circuit should have held that because § 442-h(3) is allegedly underinclusive and content-based, the statute fails to satisfy the "reasonable fit" requirement.

The Second Circuit's decision, however, is consistent with the decisions of this Court and *Pearson*. Regardless, this argument amounts to nothing more than a request for error correction, and thus does not merit a grant of certiorari.

A. The Second Circuit's Application of *Central Hudson* Is Consistent With *Discovery Network* and *Pearson*

Petitioners rely primarily on an asserted conflict between the decision below and this Court's decision in *Discovery Network* and the Seventh Circuit's decision in *Pearson*. For the Second Circuit to have been consistent with these decisions, they claim, it would have had to hold that § 442-h(3) does not "directly advance" a substantial governmental interest and lacks a "reasonable fit" because it is underinclusive. The Second Circuit, however, correctly distinguished both *Discovery Network* and *Pearson*.

In *Discovery Network* this Court considered the constitutionality of Cincinnati's policy of banning the distribution of "commercial handbills" through freestanding newsracks located on public property, while permitting the distribution of "newspapers" through the same means. The city contended that the restriction was designed to further its interest in maintaining the safety and appearance of its streets, and that applying the ban to commercial handbills but not newspapers was justified by the lower level of First Amendment protection given to commercial speech as compared to non-commercial speech. Applying *Central Hudson*, this Court concluded that there was not a "reasonable fit" between the restriction and the state interest it sought to advance:

> In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we

> are unwilling to recognize Cincinnati's bare assertion that the "low value" of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills." Our holding, however, is narrow. . . . [W]e do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks.

As the Second Circuit recognized, the present case does not fall within the holding of *Discovery Network* because New York does have legitimate reasons for deciding to regulate in-home real estate solicitations differently from other types of in-home solicitations. First, as the Second Circuit pointed out, "the cease-and-desist zones have been identified because of the high volume of citizen complaints about *real estate solicitations* sent to homes" in those areas. App. 15a (emphasis added). Second, this Court has long recognized that "'States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.'" *Florida Bar*, 515 U.S. at 625 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)). That a state chooses to regulate solicitation by members of one profession differently from how it regulates solicitation by members of a different profession is not grounds for invalidating the regulation, so long as the regulation meets the requirements of *Central Hudson*. Thus, in *Florida Bar* and *Edenfield*, the Court considered the constitutionality of restrictions on solicitations by

attorneys and accountants, respectively, without suggesting that those restrictions were suspect because they only applied to members of those professions.

The Seventh Circuit's decision in *Pearson* is similarly distinguishable. In *Pearson*, the Seventh Circuit considered the constitutionality of an Illinois statute that regulated real estate solicitation by permitting homeowners to notify real estate agents that they did not wish to be solicited. Solicitation of a homeowner by an agent who had notice of the homeowner's wish not to be solicited was a criminal offense. 153 F.3d at 399. Illinois contended that the statute furthered its interests in preventing blockbusting and preventing residential privacy. The district court's findings of fact directly contradicted the State's assertion: "blockbusting and panic peddling rarely, if ever, occur in Illinois today," and "the defendants produced no evidence in this case that real estate solicitation harms or threatens to harm residential privacy." *Id.* at 400. Relying expressly on these factual findings, the Seventh Circuit held that the statute failed to materially advance the state's asserted interests. *Id.* at 402, 404.

The distinctions between *Pearson* and the present case are clear and dispositive, as the Second Circuit observed. In *Pearson*, the regulation of real estate solicitation applied statewide, while in the present case the cease and desist regulation applies only in areas in which the Secretary of State has found homeowners to have been subjected to "intense and repeated" real estate solicitation. Moreover, in *Pearson* the Seventh Circuit relied on the factual finding that the record contained no evidence that real estate solicitation harmed residential privacy, explaining: "Absent such evidence, a mechanism whereby homeowners can reject real

estate solicitation but not other kinds of solicitation cannot be said to advance the interest in residential privacy 'in a direct and material way.'" *Id.* at 404 (quoting *Edenfield*, 507 U.S. at 767).

In the present case, by contrast, the Second Circuit found that "[t]he record adequately demonstrates that the harm to homeowners' privacy from real estate solicitations is real, and that the cease-and-desist zones advance that interest directly and to a material degree." App. 12a. As the court explained, "[t]he popularity of the program, statements at the public hearings in support of the cease-and-desist zones, and complaints of violations of the registry all support the contention that homeowners feel harassed by the amount and the intensity of the solicitations, *and that the cease-and-desist zones have alleviated that harm*." *Id.* (emphasis added). The records of the public hearings contained numerous complaints by homeowners being "bombarded," "hounded," "badgered," "inundated," and "deluged" by in-home *real estate* solicitations — by mail, telephone, and in person. Moreover, if, as petitioners suggest, real estate solicitation were no more burdensome to homeowners within the cease and desist zones than other forms of solicitation, the cease and desist zones would not have been found to be effective in alleviating the harm. In light of these fundamental distinctions between the two cases, petitioners' bald assertion that "[h]ad the Seventh Circuit addressed the New York law at issue here, it would have struck that law down," is insupportable.[5]

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5. Contrary to petitioners' suggestion, the Second Circuit's reliance on *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), was neither improper nor essential to its decision. As petitioners point out, in *44 Liquormart*, the Court held (Cont'd)

B. The Second Circuit's Conclusion That Section 442-h(3), As a Resident-Activated Measure, Satisfies the "Reasonable Fit" Requirement Is Consistent With the Decisions Of This Court

Nor does the Second Circuit's conclusion that § 442-h(3), as a resident-activated restriction, satisfies the "reasonable fit" requirement of *Central Hudson* conflict with any other decisions of this Court. The decisions petitioners reference invalidating resident-activated speech restrictions are relevant merely for the proposition that the mechanism for implementing a speech restriction — *i.e.*, the fact that it is resident-activated rather than a flat-out ban — will not save it if it is otherwise unconstitutional. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, (1992) ("[A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.") (citations omitted).

Thus, if New York lacked a proper basis for regulating in-home real estate solicitations differently from other types

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(Cont'd)
that "*Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy." 517 U.S. at 509. The Second Circuit did not rely on *Posadas* for this rejected proposition. Rather, the court cited *Posadas* (and several other decisions that have not been questioned) for the proposition that "underinclusiveness will not necessarily defeat a claim that a state interest has been materially advanced." App. 13a. In any event, because, as has been discussed, the factual record demonstrated that intense real estate solicitation was a particular problem in the areas designated as cease and desist zones, § 442-h(3), unlike the Illinois statute at issue in *Pearson*, is not underinclusive.

of solicitations, the fact that § 442-h(3) is resident-activated would not alone render it constitutional. As the Second Circuit found, however, the evidence below demonstrated that many homeowners in the cease and desist zones felt harassed and vexed by the amount of real estate solicitations they were receiving, and the establishment of the zones alleviated the problem. Given this legitimate basis for the restriction, the State's employment of the type of resident-activated mechanism that this Court has long favored, *see, e.g.*, *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 639 (1980) ("the provision permitting homeowners to bar solicitors from their property by posting [no solicitation] signs . . . suggest[s] the availability of less intrusive and more effective measures to protect privacy"), weighed strongly in favor of, not against, the Second Circuit's finding of a "reasonable fit."

III. THE NATURE OF THE LOWER COURT DECISIONS MAKES THIS CASE A POOR VEHICLE FOR REEVALUATING *CENTRAL HUDSON*'S INTERMEDIATE SCRUTINY STANDARD OR RESOLVING A CONFLICT.

Even if the Court were otherwise to determine that the circumstances of this case might warrant revisiting *Central Hudson*'s use of intermediate scrutiny or resolving a conflict, the nature of the lower courts' decisions makes this case a poor vehicle for doing so. Both the district court and the Second Circuit declined to consider respondent's alternative justification for § 442-h(3) — the prevention of blockbusting. While petitioners suggest that a lack of evidence of blockbusting in the record below precludes reliance on blockbusting as a rationale for the challenged provision, neither court below found that the record lacked evidence of

blockbusting. The record establishes that the State did introduce such evidence, including comments by residents at public hearings indicating that blockbusting tactics continued to be employed by real estate professionals.[6] Thus, if the Court were to grant certiorari, it would likely be required to evaluate the support for this asserted interest without the benefit of the lower court's factfinding or analysis, in order to resolve the constitutionality of the challenged restriction.

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6. Nor did the Second Circuit in *New York State Ass'n of Realtors v. Shaffer*, 27 F.3d 834 (2d Cir. 1994), find that the State had failed to prevent evidence of blockbusting. While, as petitioners note, the court did state that "the failure of the Secretary to provide direct and concrete evidence that the evil that the restriction purportedly aims to eliminate does, in fact, exist will doom the nonsolicitation regulation under *Central Hudson*," (Cert. Pet. at 9 n.3 (quoting *Shaffer*, 27 F.3d at 842), it is clear from the rest of the decision that the court was speaking hypothetically. Later in its opinion, the Second Circuit stated: "[T]his is not a record in which the Secretary failed to provide any evidence of blockbusting. Rather, the public hearings produced some evidence of the existence of a tangible harm that the Secretary is justified in trying to eliminate." 27 F.3d at 843.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PATRICIA C. ANDERSON, MICHAEL A. HOSEIN, AND STEPHEN E. PARKER

Petitioners,

v.

ALEXANDER F. TREADWELL, AS SECRETARY OF STATE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION

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REPLY IN SUPPORT OF PETITION

New York Real Property Law 442-h(3) is unconstitutional: It is a content-based restriction on truthful, non-deceptive commercial speech that is not intended to prevent commercial harms. Moreover, the law is underinclusive because it purports to serve a general government interest in privacy, but prohibits only speech of disapproved content by specified speakers (real estate licensees). Because § 442-h(3) regulates commercial speech, the Second Circuit held that strict scrutiny did not apply. The court also held that there is a "'reasonable fit,'" between the law at issue and its purpose, *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 565 (1980). These holdings on important, recurring legal questions conflict with decisions of this Court and of the Seventh Circuit. Each question presented is worthy of this Court's review.

Moreover, on January 10, 2003, this Court granted the petition for certiorari in *Nike, Inc.* v. *Kasky*, 71 U.S.L.W. 3319 (U.S. Jan. 10, 2003) (No. 02-575). The questions presented in that case implicate the proper scope of the commercial speech doctrine and the appropriate legal framework for analysis of commercial speech. This Court's analysis in that case may have implications here. Accordingly, the Court may wish to hold this petition pending its decision in *Nike*.

Respondents' opposition brief offers three reasons why the petition is not worthy of this Court's review. Respondents' arguments rest on mischaracterizations of the decision below and of decisions of this Court and the Seventh Circuit. When the mischaracterizations are exposed, the necessity for this Court's intervention is clear.

A. The Court Should Grant The Petition To Address When Strict Scrutiny Applies To Commercial Speech.

In arguing that the Court should not address whether strict scrutiny applies to commercial speech restrictions such as §443-h(3), respondents simply fail to address *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501 (1996), and *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992), decisions that appear to hold that strict scrutiny would apply. See Pet. at 12-14. The arguments that respondents do make, moreover, are wrong.

First, respondents contend that a majority of current Justices have not concluded that the *Central Hudson* test is inappropriate for restrictions on truthful, non-misleading commercial speech. Opp. at 12 (quoting *Thompson* v. *Western States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002)). The *Thompson* Court's statement – that "*Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision," *id.* at 12 n.4 (quotation omitted), – means that the law at issue did not survive even *Central Hudson* scrutiny and the Court was not required to decide whether strict scrutiny applied. Indeed, *Thompson* expressly acknowledges that "[m]embers of the Court have expressed doubt about the *Central Hudson* analysis." *Thompson* v. *Western States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002) The Petition demonstrates that at least five Justices have indicated that strict scrutiny properly applies to laws such as § 442-h(3). Pet. at 11-15.

Second, respondents assert that even assuming strict scrutiny applies to some commercial speech, it does not apply to restrictions on solicitation by professionals. Opp. at 13-14 (citing *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995); *Edenfield v. Fane*, 507 U.S. 761 (1993)). This contention is demonstrably wrong. These cases preceded the Court's recent, frequent expressions of concern about *Central Hudson*. Moreover, the restrictions at issue were intended

primarily to advance state interests related to the regulation of certain professions and the maintenance of public confidence in those professions' performance of important public functions. To the extent the regulations addressed privacy interests, they primarily reflected concerns about the unprofessional nature of the privacy invasion and its harm to other interests served by professional regulation. See *Florida Bar*, 515 U.S. at 624 (upholding 30-day restriction on direct mail solicitation of accident victims to protect privacy and maintain the legal profession's reputation). In fact, in *Edenfield*, the Court *vacated* the state's restriction on CPAs' in-person solicitations, despite the state's contention that its purpose was to protect consumers from fraud and preserve CPA independence. See 507 U.S. at 768. The state interests in *Florida Bar* and *Edenfield* thus were qualitatively different from New York's asserted interest here.[1] Finally, any tension between these decisions and others of this Court simply highlights the necessity of this Court's intervention to clarify the appropriate standard to use in assessing the constitutionality of laws restricting commercial versus professional solicitation.

Third, respondents contend that the "factors that have led some members of this Court to question the applicability of strict scrutiny" to commercial speech are not present here. Opp. at 14. This assertion is no more than wishful thinking. The factors that have created concern *are* present – to wit, a restriction of truthful, non-misleading speech for reasons unrelated to commercial harm (such as fraud and protection of a fair bargaining process), exacerbated by the fact that the restriction is content-based and underinclusive. See *R.A.V.*, 505 U.S. at 396 ("the only interest distinctively served by the

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[1] For example, the flyer for which petitioners were prosecuted stated: "If you have considered selling or buying a home now or in the future, or simply want to find out what your home is worth in today's market, don't hesitate to call." J.A. 30.

content limitation is that of displaying the [state's] hostility towards the particular biases thus singled out").

The absence of certain other "factors" is thus irrelevant. Respondents assert, and petitioners freely acknowledge, that a resident-activated mechanism such as § 442-h(3) is not "motivated by paternalism." Opp. at 14. The absence of this "factor" creating concern, however, does not excuse or justify the presence of state-sponsored discrimination that is both underinclusive and based on disfavored content and the identity of the speaker – indicia that strongly suggest the State's hostility to the message and the messenger.

Similarly, petitioners acknowledge that the State did not bar real estate licensees from *all* channels of advertising in cease-and-desist zones, but respondents fail to recognize that the issue is whether there are adequate alternative channels of communication and that there is no cost-effective alternative to obtain listings. J.A. 57, 60. This Court, moreover, has rejected the argument that alternative means of communication saved the restrictions on commercial speech at issue in *Bolger* v. *Youngs Drug Products*, 463 U.S. 60 (1983), and *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993). In so doing, the Court explained that although "the burden on commercial speech was imposed by denying the speaker access to one method of distribution . . . without interfering with alternative means of access to the audience. . . . [T]hat fact did not minimize the significance of the burden . . . ." *Discovery Network*, 507 U.S. at 427.[2] In addition, suitable alternative means of communication are not available to petitioners, who are barred from effective methods of generating real estate business, such as direct

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[2] *See Discovery Network*, 507 U.S. at 427 ("'[T]he Postal Service argues that Youngs can communicate with the public otherwise than through the mail. [This argument falls] wide of the mark. A prohibition on the use of the mails is a significant restriction of First Amendment rights'") (alterations in original) (quoting *Bolger*, 463 U.S. at 79-80 (Rehnquist, J., concurring).

personal contact by mail, telephone, leafleting, or in-person solicitation, in cease-and-desist zones. See Pet. at 6-7; J.A. 57, 60.

Finally, respondents incorrectly accuse petitioners of arguing that "protecting residential privacy is an insufficient justification for a commercial speech regulation." Opp. at 16. Petitioners expressly acknowledged that residential privacy is a substantial state interest that satisfies that element of the *Central Hudson* test. Pet. at 17. But, as noted above, the State's undoubted interest in protecting residential privacy is distinct from interests normally invoked to support commercial speech regulation (*e.g.*, the prevention of fraud or the preservation of a fair bargaining process). "It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.' Yet bans that target truthful, non-misleading commercial messages rarely protect consumers from such harms." *44 Liquormart*, 517 U.S. at 502-03 (citation omitted). In such circumstances, "there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.* at 501.

The Court should grant the petition to decide the proper standard of review for restrictions on truthful, non-misleading commercial speech not addressed to commercial harms.

B. The Decision Below Conflicts With Decisions Of This Court And Of The Seventh Circuit.

1. Respondents contend that there is no conflict between the decision below and this Court's decision in *Discovery Network* and the Seventh Circuit's decision in *Pearson* v. *Edgar*, 153 F.3d 397 (7th Cir. 1998). They do so by selective quotation that ignores the analytical bases for the decisions.

In *Discovery Network*, this Court struck down a ban on commercial newsracks. The Court held that the city's distinction between commercial and non-commercial

newsracks "bears no relationship whatsoever to the particular interests that the city has asserted," and that, with respect to the asserted "interest in esthetics," the commercial newsracks are "no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks." 507 U.S. at 424, 425. (emphasis omitted). In this context, the Court concluded that:

> absen[t] some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize [the city's] bare assertion that the "low value" of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills." [*Id.* at 428.]

Thus, the crucial point was that the city's law unconstitutionally discriminated against commercial speech because it was content-based and underinclusive. Commercial content was disfavored despite the fact that the commercial nature of the content had no relationship to the esthetic interests the discrimination purported to serve. The Court prohibited such an underinclusive, content-based restriction on speech because, as it later explained, "States could prevent all newsracks from being placed on public sidewalks, but . . . could not ban only those newsracks that contained certain commercial publications." *44 Liquormart*, 517 U.S. at 512 n.20.

Respondents seek to distinguish *Discovery Network* by asserting that § 442-h(3) is not underinclusive, but that effort fails. Section 442-h(3) distinguishes real estate solicitations from other commercial solicitations, but the State has failed to show that such solicitation is uniquely injurious to residential privacy. Indeed, respondents' assertion that New York had legitimate reasons for distinguishing real estate solicitation from other solicitation simply ignores the contrary factual finding of the district court, see App. 25a (the State has "not made a showing that solicitation by realtors causes greater

harm to homeowners' privacy interests than do other forms of commercial speech that broadcast through like media sources"). Moreover, although respondents repeatedly quote the court of appeals' statement that "'[t]he record adequately demonstrates that the harm to homeowners' privacy from real estate solicitations is real,'" Opp. at 21 (alteration in original) (quoting App. 12a), this reliance on the existence of citizen complaints about real estate solicitation misses the point. A demonstration that real estate solicitation adversely affects privacy is wholly unrelated to the question of its underinclusiveness, which depends entirely upon whether real estate solicitation affects privacy in a manner that other solicitation does not.

Unwelcome real estate solicitation, like all unwelcome solicitation, may invade a homeowner's privacy. But, the lower courts did not and could not find that real estate solicitation threatens or causes any unique harm to residential privacy. No such evidence exists. See also Pet. at 23 & n.9. Thus, just as the law at issue in *Discovery Network* bore no reasonable relationship to the city's stated interest, § 442-h(3)'s restriction on real estate solicitation bears no reasonable relationship to residential privacy. The decision below conflicts with *Discovery Network*.

The analytical foundation of *Discovery Network* was not lost on the Seventh Circuit when it addressed a statute materially indistinguishable from § 442-h(3). That court observed that in *Discovery Network*, the law "was underinclusive – it only attacked part of the problems of safety and esthetics caused by newsracks," and concluded that "underinclusiveness indicate[s] a lack of reasonable fit." *Pearson*, 153 F.3d at 404. The Seventh Circuit held that without evidence that real-estate solicitation uniquely harms residential privacy, "a mechanism whereby homeowners can reject real estate solicitation but not other kinds of solicitation cannot be said to advance the interest in residential privacy 'in a direct and material way.'" *Id.* That is the situation here,

and §442-h(3) would not have withstood constitutional scrutiny in the Seventh Circuit.

Respondents cite distinctions that are wholly irrelevant. For purposes of *Central Hudson*, it makes no difference that the Illinois statute applies statewide, while § 442-h(3) applies only in cease-and-desist zones (*e.g.*, the entire County of Queens). What is determinative is that the States failed to show that real estate solicitation causes unique harm to residential privacy. Both statutes are equally unconstitutional under *Central Hudson* and *Discovery Network*.

The decision below thus conflicts with decisions of this Court and with *Pearson*. This Court should grant the petition to resolve these conflicts.[3]

2. Petitioners agree with respondents that a resident-activated mechanism for implementing restrictions on speech will not save a speech restriction that "is otherwise unconstitutional." Opp. at 22. Section 442-h(3) is not content-neutral, because it applies only to real estate related speakers and messages. Thus, the fact that § 442-h(3) is resident-activated does not immunize its content discrimination and underinclusive coverage from constitutional scrutiny. Cf. *R.A.V.*, 505 U.S. at 388-89 (applying strict scrutiny to content-based regulation of wholly unprotected categories of speech).

That is the rule derived from language in this Court's cases addressing resident-activated mechanisms. See, *e.g.*, *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 737 (1970) (approving content-neutral resident-activated mechanism); *Pearson*, 153 F.3d at 404 ("*Rowan* involved no governmental distinction between one kind of offensive material and another – all distinctions were made by the homeowner").

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[3] Respondents do not even attempt to refute petitioners' demonstration that the decision below conflicts with *Carey* v. *Brown*, 447 U.S. 455 (1980), and *Police Department* v. *Mosley*, 408 U.S. 92 (1972). Pet. at 24.

Indeed, respondents concede that if "New York lacked a proper basis for regulating in-home real estate solicitations differently from other types of solicitations, the fact that § 442-h(3) is resident-activated would not alone render it constitutional." Opp. at 22-23. The record is devoid of evidence that real estate solicitations uniquely harm residential privacy, which is what the district court found and the court of appeals implicitly acknowledged.

As set forth in the petition, resident-activated mechanisms are increasingly popular government tools. This effective and popular legislative device, however, may not be used to punish and abridge speech based on its content. The petition should be granted to address the use of resident-activated mechanisms to impose content-based restrictions on disfavored speech.

C. This Case Is An Excellent Vehicle For Resolution Of The Issues Presented.

Respondents' final contention is that the petition should not be granted even if the issues are important and recurring and even if conflicts and uncertainty exist. Respondents point out that the lower courts did not address the State's alternative justification for § 442-h(3) – prevention of blockbusting – and surmise that this Court would therefore be required "to evaluate the anti-blockbusting interest asserted by the State without the aid of analysis by the lower courts." Opp. at 10.

Respondents are wrong. The court of appeals held that § 442-h(3) is constitutional based on the State's substantial interest in protecting residential privacy. App. 10a-11a. Only that judgment and the issues it presents are before this Court.

As described in the petition, it is clear why the lower courts declined to rely on the State's asserted alternative interest in preventing blockbusting. The Second Circuit had already held that "the failure of the Secretary to provide direct and concrete evidence that the evil that the restriction purportedly aims to eliminate does, in fact, exist will doom the

nonsolicitation regulation under *Central Hudson*." *New York State Ass'n of Realtors, Inc.* v. *Shaffer*, 27 F.3d 834, 842 (2d Cir. 1994). (This discussion is not "hypothetical[]," as respondents state, Opp. at 24 n.6; the court of appeals found the evidence of blockbusting insufficient to support the law.) In this case, petitioners showed, as in *Shaffer*, that there was no basis for finding that § 442-h(3)'s restriction on speech could be supported by the State's interest in preventing blockbusting. See Pet. at 9 n.3. The district court eschewed reliance on the blockbusting rationale, while the Second Circuit explicitly stated that its decision was based *solely* on the State's interest in protecting residential privacy.

There are no circumstances under which this Court would be required to rule in the first instance on the State's alleged alternative justification. If the Court were to vacate the court of appeals' decision, it would remand this matter for further proceedings, at which point the lower courts would be free to take up any issues the State has preserved. Unless and until this Court acts, however, the court of appeals' decision – holding that the underinclusive, content-based restriction on truthful, non-misleading commercial speech set forth in § 442-h(3) is neither subject to strict scrutiny nor unconstitutional under *Central Hudson* – stands. That decision, which squarely decides important and recurring questions in a manner that conflicts with decisions of this Court and others, is worthy of this Court's plenary consideration.

CONCLUSION

For the reasons set forth in the petition and in this reply brief, the petition for certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Nike, Inc.* v. *Kasky*, 71 U.S.L.W. 3319 (U.S. Jan. 10, 2003) (No. 02-575).

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